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No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

HOLYWELL CORPORATION and
THEODORE B. GOULD,
Petitioners

v.

FRED STANTON SMITH, Trustee of the
Miami Center Liquidating Trust, and
THE BANK OF NEW YORK,
Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. In a Chapter 11 Reorganization Proceeding, may the assets of a non-debtor corporation, which corporation is a separate, solvent subsidiary of a debtor parent, be confiscated by a trust created in a confirmed plan proposed by the major creditor of a debtor, in the absence of consolidation based upon evidence that the subsidiary is a sham, alter ego, or of a fraudulent transfer of assets, and where the subsidiary's separate corporate identity is uncontested?

2. Since a bankruptcy court's subject matter jurisdiction is limited to property of the debtor, may such a court order that a non-debtor's property be given over to a plan-created trust, without the consent of such non-debtor (who was not before the court) and in the absence of adhering to state corporation law requiring the payment of corporate liabilities prior to issuance of a dividend to the debtor parent, and over Petitioners' objections?

3. Does the raising in its opinion of the issue of equitable estoppel on appeal *sua sponte* by the appellate (district), where no evidence was presented nor findings made thereon in the bankruptcy court below and where such issue was not specifically plead, represent an abandonment of the court's duty under Rule 52(a) of the Federal Rules of Civil Procedure and an unconstitutional denial of due process?

4. May the Court of Appeals, by affirming the district court's invocation of "equitable estoppel," sanction the taking of the private property of a solvent corporation for a private use, without consent and without consideration?

5. Did the court below err in affirming the district court's application of equitable estoppel so as to preclude Petitioner's objections that the confiscation of a non-

debtor subsidiary corporation's assets was an abuse of power and beyond the bankruptcy court's jurisdiction?

6. Did the court of appeals err in labelling as "frivolous" appellate allegations of deprivations of rights guaranteed by the Fifth Amendment to the Constitution and of actions by the court in the absence of subject matter jurisdiction over the property of non-debtors?

PARTIES TO THE PROCEEDING

Petitioners before this Court, appellants before the United States Court of Appeals for the Eleventh Circuit, are Theodore B. Gould and Holywell Corporation. The Respondents are the Bank of New York and Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust, who were the appellees below.

Pursuant to Rule 28.1, the only Petitioner which is a corporation is Holywell Corporation, which has no parent corporation and no subsidiaries or affiliates except wholly-owned subsidiaries (none of which, with the sole exception of Miami Center Corporation, were debtors in the Chapter 11 proceeding below.)



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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Petitioners Holywell Corporation and Theodore B. Gould respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered on April 20, 1988, denying a Petition For Rehearing and Suggestion Of Rehearing In Banc upon that court's original opinion entered on March 18, 1988.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit's order, entered April 20, 1988, is a *per curiam* denial of rehearing and rehearing in banc and is not reported. It is reprinted in the Appendix hereto ("App.") at 1a. The original opinion of the court of appeals below, entered on March 18, 1988, is reprinted at App. 3a. It is not a reported opinion.

The lower court opinions which were the subject of the review below and relevant to the Court's consideration of this Petition are also reprinted in the Appendix and, if such opinions have been reported, the citation is indicated in the Table of Contents to the Appendix.

JURISDICTION

Petitioners appealed to the Eleventh Circuit Court of Appeals from an order of the United States District Court for the Southern District of Florida, App. 5a, which affirmed a prior order of the United States Bankruptcy Court. App. 15a. The Court of Appeals, by order and opinion entered March 18, 1988, affirmed the district court's order. App. 3a. Petitioners timely filed a Suggestion of Rehearing In Banc. On April 20, 1988, the Court of Appeals entered its final order, App. 1a, denying rehearing and suggestion of rehearing in banc.

The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. Section 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The applicable provisions of the United States Constitution, the United States Code, and the Federal Rules of Civil Procedure, are set forth in the Appendix hereto at page 54a.

STATEMENT OF THE CASE

Petitioners, discharged debtors in a Chapter 11 reorganization proceeding, moved the bankruptcy court to prevent the confiscation of over \$13.9 million belonging to a non-filed, solvent subsidiary of Petitioner Holywell, in the absence of consolidation and without adherence to state corporation law requiring the satisfaction of the subsidiary's corporate liabilities prior to issuance of a dividend to the parent stockholder. Although the subsidiary was not a party to the proceeding, the bankruptcy court confiscated its assets. On appeal, the district court invoked, *sua sponte*, equitable estoppel to deny Petitioners the right to object to the confiscation.

The United States Court of Appeals for the Eleventh Circuit, in its decision below, has affirmed the *sua sponte* invocation of equitable estoppel by the district court to permit that confiscation by the Respondent Trustee of the Miami Center Liquidating Trust (created post-confirmation without consent as part of a confirmed plan proposed by Respondent and major creditor Bank of New York), despite the complete lack of any attempt to show that the separate subsidiary corporation was a sham or the alter ego of its parent. The issues of the bankruptcy court's limited subject matter jurisdiction and the unconstitutional deprivation of property were summarily dismissed by the Eleventh Circuit's panel as "frivolous." The following is a brief statement of the background and pertinent underlying proceedings:

The bankruptcy proceedings from the which this petition arises relate to the construction and development of the Miami Center, a mixed-use commercial real estate project, located in downtown Miami, Florida. A Florida general partnership, Chopin Associates ("Chopin"), comprised of Petitioner Gould and Miami Center Corporation ("MCC"), a wholly owned subsidiary of Petitioner Holywell, purchased the land in 1979 and entered into a 99-year ground lease with Miami Center Limited Partnership ("MCLP"). MCLP, a Florida limited partnership whose general partners are Gould and MCC, was to construct and own the improvements. Respondent The Bank of New York ("The Bank") was the lead interim construction lender and completely controlled each disbursement and source of funds in the construction and development process.

When, in 1982, additional financing became necessary to complete the project, the Bank required that Holywell and Gould guarantee each additional loan. In addition, in an Assignment and Security Agreement dated June 23, 1983, ("the Assignment") between Holywell and The Bank, Holywell was required, as partial consideration for additional construction loans by The Bank to MCLP and Chopin, to post as additional collateral a security interest in Holywell's ownership of the stock of Twin Development Corporation and other wholly-owned subsidiaries.

Twin Development Corporation ("Twin") is a Virginia corporation, formed in 1977, which had purchased land in Arlington, Virginia, and a general partner of 1300 North 17th Street Associates ("1300"), a Virginia limited partnership which owned a leasehold interest in, and an office building on, Twin's land. Twin never pledged its assets to The Bank of New York as security for the Miami Center loans to MCLP and Chopin. Thus, while the June 23, 1983, Assignment granted the Bank a security interest in the stock of Twin, owned by Holywell, it did not grant a security interest in Twin's assets.

In 1984, MCLP, Chopin, MCC, and Petitioners Holywell and Gould filed separate petitions for relief under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. Section 101 *et seq.*) in the aftermath of foreclosure actions initiated by, and disputes over the lending practices of, Respondent Bank of New York. The five separate proceedings in the United States Bankruptcy Court for the Southern District of Florida were immediately consolidated, but only for administrative purposes. Twin Development Corporation did not file such a petition and has at all times been a solvent (but for the confiscation of its assets condoned by the decisions below) and independent corporate entity.

Shortly before the filing of the Chapter 11 petitions, Twin, 1300, and certain other limited partnership entities (none of which were debtors) had entered into a contract to sell land and office buildings in the Washington, D.C. area [the "Washington Properties"] which these Selling Entities owned. The aggregate gross purchase price for the three buildings was \$112,000,000. Since Petitioners Holywell and Gould had interests, as shareholders and/or partners, in these Selling Entities, Petitioners asked the bankruptcy court to authorize them to take the necessary actions as shareholders or partners, to consummate the sales contemplated by the contract. The sale itself, by the non-debtor Selling Entities, was clearly not subject to the authority of the bankruptcy court, and Holywell, by requesting permission, as Twin's stockholder, to vote for the sale, certainly did not (nor could it have if it had wanted) confer subject matter jurisdiction on the bankruptcy court over non-debtor Twin's assets.

On October 22, 1984, the bankruptcy court entered an order authorizing Petitioners to take the appropriate steps to consummate the sale of the Washington Properties by the non-debtor Selling Entities and directing that *Holywell* and *Gould* segregate the share of *net* proceeds due *Holywell* and *Gould* from the sale of the prop-

erties, investing those funds in accordance with Section 345 of the Bankruptcy Code and holding the funds subject to further order of the court. App. 25a. A subsequent bankruptcy court Order of December 11, 1984, directed Holywell to cause Twin to deposit into another segregated account, subject to further order of the Court, any *net* funds payable to Twin from the Washington Properties sale. App. 17a.

Finally, on December 31, 1984, the bankruptcy court entered an order which characterized the net proceeds due Holywell and Gould as "Cash Collateral," in which the Bank "appeared to have" a first lien security interest, as additional collateral for a portion of its construction loans to MCLP and Chopin. App. 21a. This "Cash Collateral Order" expressly recognized that the Selling Entities and their limited partners had their own obligations and liabilities to third parties, which would be satisfied prior to issuance of a dividend to Holywell, the partner debtor, obviously including severe income tax liabilities arising from such a substantial capital transaction. The Order stated:

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and *all obligations to the Internal Revenue Service are determined and paid.* [Emphasis supplied]

The especial significance of this provision will become apparent when it is explained below how, in purported implementation of a plan of reorganization proposed and "crammed down" by the Respondent Bank without a hearing, the Respondent Trustee confiscated the entirety of Twin's share of the proceeds without any provision having been made for its substantial tax and third-party

liabilities, and on April 28, 1988, notwithstanding the prior "Cash Collateral" Order and the Trustee's possession of substantially all of the property of Holywell Corporation and its non-filed wholly-owned subsidiaries, the bankruptcy court ruled that the Trust was a "grantor trust" and the Trustee, as a "disbursing agent," was not responsible for the payment of Holywell's federal income tax liabilities incurred during the administration of the case and arising from the plan's implementation [See 26 U.S.C. Section 6012(b)(3); 26 U.S.C. Section 6151(a); *Matter of I. J. Knight Realty Corp.*, 501 F.2d 62 (3rd Cir. 1974); and *Louisville Property Co. v. United States*, 140 F.2d 547 (6th Cir. 1944)], no provision having been made in the confirmed plan for the payment of taxes, and the plan's piecemeal dismantling could not be allowed. App. 36a.

Twin and the partnerships consummated the sale of the Washington Properties. As a result of the sales, Theodore B. Gould received a cash distribution of \$4,331,157. Holywell received a cash distribution of \$12,303,869. Twin received a distribution of \$13,163,490. The other non-filed entities received \$3,547,000. These cash distributions were made without consideration of federal income tax liabilities related to the sale transaction. The distributions were deposited in segregated accounts in accordance with the bankruptcy court's orders. Twin retained full investment discretion over funds deposited in the segregated Twin account. Twin's funds were not used for any purpose except to make a super-priority loan (approved by the bankruptcy court) to MCLP.¹

Each of the Debtors timely filed disclosure statements and plans of reorganization on February 15, 1985, and

¹ It is also significant that, after confirmation, the same bankruptcy judge who had allowed Twin's funds to be taken over by the Respondent Trustee, in disregard of Twin's separate identity, ordered that this super-priority loan must be repaid by the Trustee to Twin.

amended them on March 21, 1985.² However, the court permitted the simultaneous filing of competing plans by creditors and the Bank filed a consolidated disclosure statement and plan of reorganization on February 26, 1985, which was amended as of March 22, 1985 (the "Plan"). The Bank's Plan was further amended through a series of stipulations with the creditors' committees of the various Debtors. None of the Debtors were parties to these stipulations.

The principal elements of the Bank's Plan were as follows:

(a) Substantive consolidation of the debtors' estates (this consolidation did not extend to Twin and the other non-filed corporate subsidiaries of Holywell, but was limited to "the property of the estates of the Debtors");

(b) Creation of the Miami Center Liquidating Trust, in which the property of the debtors' estates was vested,³

² The plans of MCLP and Chopin provided, in pertinent part, that the real estate would be sold exclusive of any furniture, fixtures and equipment, for \$260,000,000 to an unaffiliated third party and that Holywell would loan \$10,000,000 to MCLP to allow MCLP to complete payment of its creditors. No loan from or confiscation of Twin's assets was either proposed or necessary.

³ "... [vesting in the] Trustee . . . *all property of the estate of the Debtors* within the meaning of Section 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors . . . to *hold, liquidate, and distribute* such Trust Property according to the terms of this Plan . . ."; "... (c) Reduce all of the Trust Property to his possession and hold the same; (d) Sell and convert the Trust Property to cash and *distribute the proceeds as specified herein*; (e) *Manage, operate, improve, and protect* the Trust Property . . . and (j) *Release, convey or assign any right, title or interest in or about the Trust Property*"; "... (u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them . . ."; "... (w) Deal with the Trust Property or any part or parts thereof . . . as would be lawful for any person owning the same . . ." and "(x) Take no action

and appointment post-confirmation of a trustee of that trust;

(c) The Trustee's sale of the Miami Center Project to the Bank of New York or its nominee for \$255.6 million, payable by cancelling the mortgage debts including accrued unmatured interest up to the closing of the sale, with the balance of the purchase price paid in cash;

(d) Taking of chattels which were *not* the property of the debtors' estates, owned by non-filed solvent affiliated creditors, and leased to the Miami Center Limited Partnership, *without consent* of the owner/lessors, without additional consideration and based upon subordination of their claims as "insiders" without provision for the cure of over \$5.7 million in pre-petition rent-defaults;

(e) Subordination of the valid pre-petition claims of affiliated creditors and equity holders as "insiders," in the amount of \$26,123,498 based upon classification;

(f) Dismissal with prejudice by the trustee of a civil action which the Debtors had previously filed in the United States District Court against the Bank alleging, *inter alia*, breaches of contract, breaches of fiduciary duty, fraud and usury; and

(g) Payment of the allowed claims against MCLP and the other Debtors from the cash assets of the Trust, including the cash of Holywell's non-filed corporate subsidiaries without establishing reserves for payment of their third-party corporate liabilities, including federal and state income taxes.

The Bank's Plan proposed to transfer the sales proceeds from the Washington Properties to the Trust after title to the Miami Center had been conveyed and the Bank's lien on the stock of the non-filed subsidiaries had been released. In other words, the Bank proposed to transfer the Washington Properties sales proceeds to the

that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions."

Trust, even though the only basis for a claim to those sales proceeds—the Bank's lien on the stock—would already have been satisfied.

Thus, while the Plan spoke of Washington Proceeds, the pre-existing "Cash Collateral" Order of December 31, 1984, had expressly required, as did state corporation law, the payment of Twin's liabilities, including federal income taxes, prior to issuing any dividend to Holywell, the debtor-shareholder.

It was also clear that there had been no consolidation of non-debtor Twin with the debtors and no attempt whatsoever to pierce Twin's "corporate veil" as a sham or alter ego. The funds owned by Twin and held in Twin's segregated account were not legally subject to being used, in the event of confirmation, to pay the pre-petition liabilities of the debtors without Twin's consent.

No provision was made in the Plan for the repayment of the court-authorized "super-priority" loans in the amount of \$4,717,404 plus accrued interest. No provision was made for the payment of federal income taxes to the Internal Revenue Service and state income taxes to the Commonwealth of Virginia, in the total estimated amount of \$20,763,841.

Despite numerous objections filed by Petitioners and others to the Bank's Plan, including objections on the grounds that Petitioners and their non-filed affiliates, such as Twin, had deferred income tax liabilities related to the sale of the Washington Properties for which no reserve had been established, and that the Bank's Plan had the effect of consolidating the assets of non-filed, profitable, operating companies with those of insolvent entities, the bankruptcy court entered an order confirming the Plan on August 8, 1985 [App. 28a], without having held a confirmation hearing. A separate order appointing Fred Stanton Smith as Trustee of the Miami Center Liquidating Trust followed on August 12, 1985 [App. 33a], without having satisfied the applicable statu-

tory requirements of 11 U.S.C. Section 1104(a) and contrary to 11 U.S.C. Section 105(b).

Significantly, the confirmation order was entered without the Court ever having held the confirmation hearing mandated by 11 U.S.C. Section 1128. A *scheduled* hearing on April 29, 1985 was postponed by the bankruptcy judge and never re-convened. The only hearing held concerning the plan was limited to the proposed substantive consolidation of the *debtors'* estates, held on July 23, 1985. Thus, neither the Petitioners nor Twin nor any other party in interest was afforded an opportunity to be heard, present evidence, cross-examine witnesses, or object to the Bank's use of documents.⁴

⁴ An appeal from the confirmation order was made to the district court (Aronovitz, J.), which remanded the case to the bankruptcy court so that the bankruptcy court could make findings of fact and enter conclusions of law. The bankruptcy court adopted *in toto* the findings of fact and conclusions of law prepared by the Bank as the prevailing party, without reviewing any physical evidence or documents or hearing testimony from witnesses upon which credibility determinations could have been based. The district court affirmed, having granted deference of the "clearly erroneous" standard in appellate review of the findings of fact and conclusions of law adopted verbatim on remand. *Miami Center Limited Partnership, et al. v. The Bank of New York*, 59 Bankr. 340 (Bankr. S.D. Fla. 1986). The decision of the district court was appealed to the United States Court of Appeals for the Eleventh Circuit, which dismissed the appeal on the basis of mootness, having also granted deference of the "clearly erroneous" standard for the limited purpose of reviewing the findings of fact and conclusions of law as applied to mootness. 820 F.2d 376 (11th Cir. 1987). On rehearing, the Court of Appeals vacated the district court order, directing the *district judge* to dismiss the appeal as moot. 838 F.2d 1547 (11th Cir. 1988). A petition for writ of certiorari is presently pending in this Court (No. 87-1988) related to that decision. Other appeals arising out of the bankruptcy proceedings below have been filed. For example, Miami Center Joint Venture, an affiliated creditor, has appealed the subordination of its claim, and the district court (by another judge) has *reversed* the confirmation order and remanded for further proceedings. *Olympia & York Florida Equity Corp., et al. v. The Bank of New York*, No. 85-3230-CIV-ATKINS. Thus, the confirmation order stands reversed even while a different dis-

Immediately after denial of the stay pending appeal, (because the Debtors could not post a \$50,000,000 supersedeas bond, good only for 90 days), the Bank and the Trustee took steps to consummate the Plan. The closing of the sale of the Miami Center Project assets commenced on October 10, 1985, and “. . . the Debtors were discharged pursuant to Section 1141” [Bkrcty., *Order On Remand*, January 29, 1986].

The Miami Center Liquidating Trust conveyed the Miami Center Project assets to the Bank's designee, and the Trustee took possession and control of the Debtors' estates. As a result of this closing, on October 10, 1985, the Bank's claim against the Debtors was satisfied, and its lien on the stock of Twin Development Corporation was extinguished. The closing, however, has never been completed. Pursuant to a “Closing Adjustment” letter issued on the same day, final settlement was adjourned for 45 days so that disputes between the Bank and the Trustee concerning various credits could be resolved. These disputes remain unresolved and have continued to prevent final settlement.

The immediate cause for events leading to this Petition involves two United States Treasury bills held by Twin. These Treasury bills, having a par value of \$13,949,000—representing Twin Development's share of

trict judge's affirmance of the same order has been vacated by the Eleventh Circuit on the basis of its “mootness” doctrine. None of this has kept the Plan's Trustee from taking possession of assets and starting to carry out the Plan. Meanwhile, in *Holywell Telecommunications, et al. v. The Bank of New York*, No. 85-3431-CIV-KEHOE, Judge Kehoe recognized the separate and distinct existence of subsidiaries of Holywell Corporation and remanded that case to the bankruptcy court citing a lack of any findings to support the confiscation of their property through the plan. The bankruptcy court has subsequently adopted *in toto* the Bank of New York's proposed findings and sent the appeal back to Judge Kehoe. The Bank of New York has filed an appeal of the bankruptcy court's order authorizing immediate repayment of certain super-priority loans made by Gould, Holywell, and Twin.

the Washington Proceeds—were held in the segregated account established by Twin at the Florida National Bank in Miami pending release of the Bank's lien on Twin's stock. One bill matured March 13, 1986, with a par value of \$2,200,000. The second matured on March 27, 1986, with a par value of \$11,749,000. On January 21, 1986, Twin forwarded two letters—one to the Trustee, and one to John Benbow, President of Florida National Bank. The letters asserted that the Trustee did not have any authority with respect to the assets of Twin and put the Florida National Bank on notice that it was not to sell the two Treasury bills which were owned by Twin at the request of the Trustee.

On the same day, the Trustee sought to wire transfer \$988,000 from the Miami Center Liquidating Trustee's checking account with Florida National Bank in order to pay a disputed claim under a settlement agreement previously approved by the bankruptcy court. In addition, checks drawn by the Trustee in the approximate amount of \$385,000 were outstanding against the Trustee's checking account. Although the Miami Center Liquidating Trust had \$1,133,687 in the Sun Bank, the Trustee's checking account at Florida National Bank at that time had only approximately \$60,000 in funds. Since the Trustee did not transfer funds from the Sun Bank, to honor the request for a wire transfer, the Florida National Bank would have had to encash Twin's Treasury bills and move the proceeds from Twin's account to the Trustee's account. When the Florida National Bank received the January 21, 1986, correspondence from Twin, it advised the Trustee that it would not encash the Treasury bills and transfer money from the Twin account so that it could honor the Trustee's checks or comply with his request for a wire transfer.

A brief stalemate ensued. Petitioners filed an emergency motion for clarification seeking a decision from the bankruptcy court on the status of ownership of the

funds in excess of \$13.9 million, including taxable interest income, held in the Twin account at Florida National Bank in Miami. This motion was filed on January 22, 1986. The Trustee responded on January 24, 1986, seeking an order that he had exclusive control and use of this account, and an order to show cause addressed to Gould asking why he should not be held in contempt.

On January 28, 1986, the bankruptcy court entered an order stating that the Trustee "was the sole and only party under the orders of this Court, to the exclusion of all others, that may direct the Florida National Bank of Miami, its officers, agents and servants to encash the United States Treasury bills in account number 0002942207, which account is in the name of Twin Development Corporation, and to distribute the proceeds of said encashment." App. 16a. The bankruptcy court denied the Trustee's application for an order to show cause why Gould should not be cited to the United States District Court for the Southern District of Florida for contempt. App. 16a.

Petitioners filed a notice of appeal from the bankruptcy court's order on February 5, 1986. On February 20, 1987, the United States District Court affirmed the bankruptcy court's order, reasoning that Holywell and Gould were *equitably estopped* from objecting to the use of the Twin assets. App. 9a. The invocation of "equitable estoppel" by the district court on appeal was *sua sponte*, estoppel not having been plead or presented below or specifically raised as an issue in the appeal. According to the district court, Petitioners had repeatedly acknowledged by "conduct and acquiescence" that Twin's share of the proceeds from the Washington Properties would be available to the Debtors' creditors. App. 10-11a. Even if Holywell and Gould did not intend to mislead the Bank, said the district court, their conduct was negligent. App. 12a. The district court further stated that the Bank had relied to its detriment on the conduct

of Gould and Holywell with respect to the use of Twin's assets. Thus, reasoned the district court, Holywell and Gould were equitably estopped from complaining about the treatment of Twin's assets. The requirements of the bankruptcy court's "Cash Collateral" Order of December 31, 1984 [App. 22a] were ignored. Issues of the lack of subject matter jurisdiction and the confiscation of private property for private use were ignored.

Petitioners filed a notice of appeal from the United States District Court's order on March 6, 1987. On March 18, 1988, the Eleventh Circuit Court of Appeals affirmed *per curiam* the district court's order, finding no error in the application of equitable estoppel and, without elucidation, stating that "Appellants' other claims on appeal are frivolous." App. 4a.

Petitioners filed a timely motion for rehearing, suggesting rehearing in banc, in which the Court of Appeals was asked to clarify whether its March 18, 1988 order indeed was intended to label as "frivolous" issues concerning the bankruptcy court's subject matter jurisdiction over the assets of non-debtors, pervasive denials of both procedural and substantive due process rights, and the illegality of a post-confirmation "trustee" with the powers of a "receiver" expressly forbidden by Section 105(b) of the Bankruptcy Code. In a *per curiam* form order of April 20, 1988, the Eleventh Circuit denied, without opinion, the petition for rehearing and Suggestion of Rehearing In Banc. App. 1a.

REASONS FOR GRANTING THE WRIT

- I. The Decision Below Is In Conflict With Previous Decisions Of This Court And Of Other Courts Of Appeal In That It Sanctions The Seizure Of Property Of A Party Not Before The Court, Without Notice Or Hearing, And Confers Unlimited Subject Matter Jurisdiction On The Bankruptcy Court.**

As succinctly stated by this Court in *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437, 66 S.Ct. 247, 249, 90 L.Ed. 181 (1946) :

While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages.

There can be no clearer rule of law than that, *in the absence of consolidation*, a corporation's identity cannot be disregarded and its assets cannot be summarily applied to the obligations of others. In the absence of consolidation of the debtor estates with the non-filed affiliated corporations, it is improper to use Twin Development Corporation's assets to satisfy the debts or claims against the debtors. *Matter of Walsh Construction, Inc.*, 669 F.2d 1325 (9th Cir. 1982). See also *Matter of Sandefer*, 47 B.R. 133 (Bkrcty. N.D. Ala. 1985); *Matter of Wm. Gluckin Company, Ltd.*, 457 F. Supp. 379 (S.D. N.Y. 1978); *In re Beck Industries, Inc.*, 479 F.2d 410 (2d Cir. 1973), *cert. den.* 414 U.S. 858 (1973).

As Twin Development Corporation's separate corporate identity has been consistently maintained and cannot be disregarded, it is axiomatic that Twin's assets cannot be treated as the assets of its stockholder. In the words of Justice Holmes, in *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 24, 51 S.Ct. 15, 75 L.Ed. 140 (1930) :

[I]t leads nowhere to call a corporation a fiction. If it is a fiction, it is a fiction created by law with

intent that it should be acted on as if true. The corporation is a person and *its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members.* [emphasis supplied]

See also *In re Beck Industries, Inc., supra*, ("Ownership of all of the outstanding stock of a corporation, however, is not the equivalent of ownership of the subsidiaries' property or assets." 479 F.2d at 415)

The Plan's Article V, *Creation of Trust*, which enumerates what shall be included in the Trust property, makes no mention whatsoever of the stock certificates of Twin Development Corporation, or the control or ownership of Twin Development Corporation as being included in the Trust Property.

Indeed, the Respondent trustee has taken an exactly consistent legal position in formal pleadings filed in the bankruptcy court. An example of that position, which does not differ from the position taken by the Petitioners herein, was stated by the trustee in his "Reply to Response of Bank of New York" filed on May 1, 1987:

The confirmed plan did not specifically indicate what properties of the Debtors were in fact needed and essential to consummation of the Plan. There is no doubt that there are assets revested with the discharged Debtors, which property was not needed to effectuate the Plan.

Had the Plan properly enumerated all of the assets of the Debtors with which the Plan dealt, the limitation of revestiture of the unneeded property would have been certain. Instead, the Plan provided for the creation of a Section 541(a) trust, without dealing with what property would revest with the order of confirmation. *At the moment of confirmation the trust was created and the undesignated and unneeded assets were revested with the Debtors.* (pp. 5-6, "Reply to Response of Bank of New York," 5-1-87, emphasis supplied)

It is clear that Twin Development Corporation has continuously existed as a distinct non-debtor corporate entity. Its shareholder continues to be Holywell Corporation, a discharged debtor, free and clear of any interest of the Miami Center Liquidating Trust, and Twin's director and President continues to be Theodore B. Gould, a discharged debtor. Twin's funds, now in the hands of the trustee, are assets of Twin Development Corporation and were never "turned over" in any way or divided to its parent or anyone else. These established facts render the orders of the bankruptcy court and the district court below void for lack of subject matter jurisdiction.

The bankruptcy court had no jurisdiction over the assets of Twin, since such jurisdiction is expressly limited to the "property of the debtor as of the commencement of the case and of the estate." 28 U.S.C. 1334(d), *Matter of Wm. Gluckin Company, Ltd.*, 457 F. Supp. 379, 383 (S.D. N.Y. 1978), citing *Callaway v. Benton*, 336 U.S. 132, 142, 69 S.Ct. 435, 435, 441, 93 L.Ed. 553 (1949); *In re Beck Industries Inc.*, *supra*; *In re Unishops, Inc.*, 494 F.2d 689 (2nd Cir. 1974); *Matter of Paso del Norte Oil Co.*, 755 F.2d 421 (5th Cir. 1985); *Matter of Walway*, 69 B.R. 969 (Bkey. E.D. Mich. 1987). Subject matter jurisdiction cannot be conferred upon the Bankruptcy Court by consent or the conduct of the parties. *Matter of Paso del Norte Oil Co.*, *supra*; *In re Texas Consumer Finance Corporation*, 480 F.2d 1261 (5th Cir. 1973).

Circuit Judge (now Eleventh Circuit Chief Judge) Roney, writing for the 5th Circuit in the 1973 case of *In re Texas Consumer Finance Corporation*, *supra*, announced a binding precedent for the Eleventh Circuit Court of Appeals which is analagous to the fact and procedural pattern below and should have been dispositive. In *Texas Consumer*, a bankruptcy judge was asked to order non-debtor shareholders of a debtor corporation to surrender their shares for cancellation on the basis that

their conduct and alleged promises to do so as a condition precedent to confirmation of a Plan "equitably estopped" them from refusing to do so. Judge Roney stated the issue, the case, and its holding:

Does a Bankruptcy Court have jurisdiction in a Chapter XI proceeding to order the surrender for cancellation of the outstanding preferred stock of the bankruptcy corporation? We answer this question in the negative and reverse the order of the District Court

We find that the Referee confused his equitable powers to deal with matters and persons properly before him with his statutory jurisdiction. Id. at 1263-1264. (emphasis added)

As to the ability to consent to or acquiesce in subject matter jurisdiction, Judge Roney wrote:

It is the mode of procedure that is the subject of consent. Jurisdiction of subject matter must be established before this question may even be raised, and it cannot be conferred by consent, agreement or by other conduct of the parties. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167 (1939). *Id.* at 1266.

In the instant case, the bankruptcy court sanctioned the seizure of Twin Development Corporation's assets, for a private purpose, without notice, hearing, compensation or consent, when Twin was not a party to the bankruptcy proceedings. As this Court stated, in the words of Justice Brandeis, in *Thompson v. Consolidated Gas Company*, 300 U.S. 55 (1937):

"... one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."

Such a clear violation of the substantive due process guarantees of the Constitution's Fifth Amendment are only exacerbated when accomplished by a court acting in the absence of subject matter jurisdiction. As this Court

has held, in connection with the power of a bankruptcy court,

“Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, *their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal*

For a court to extend the act to [unincluded] corporations . . . is to *enact* a law, not to execute one” [Emphasis supplied]

Vallely, Trustee v. Northern Fire & Marine Insurance Company, 254 U.S. 348, 353, 356 (1920), *citing Elliott v. Peirsol*, 26 U.S. (1 Pet.) 328 (1828) and *Old Wayne Mutual Life Association v. McDonough*, 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 (1907).

The court of appeals below, in its decision, has thus engaged in “enacting law” and this Court should declare that decision, as well as the orders below, to be *nullities*.

II. The Questions Are Of A Recurring Nature And Of Vital Importance To The Business Community.

The widespread use of multi-tiered corporation, a parent company with separate subsidiary entities sharing some degree of common corporate structure, is an established norm of business.⁵ When the parent company faces financial problems which cause it to seek the protection accorded by Congress in the reorganization provisions of the United States Bankruptcy Code, that protection should not become an invitation to destroy the viability of a perfectly solvent, separate subsidiary entity, based on nothing more than its affiliation with the parent debtor.

⁵ See, e.g., *In re F. A. Potts Co., Inc.*, 23 B.R. 569, 571 (Bkcty. E.D. Pa. 1982) in which a bankruptcy court noted its “recognition of the increasingly widespread existence in the business world of parent and subsidiary corporations with interrelated corporate structures and functions.”

If a creditor can (a) propose a "plan" for the parent company which purports simply to hand over to that creditor and other creditors of the parent the assets of a non-debtor, solvent subsidiary, (b) if a court can confirm that "plan" without a confirmation hearing and ignore the jurisdictional limits placed on a bankruptcy court by Congress, (c) if an appellate tribunal can ignore all these issues by *sua sponte* invoking "equitable estoppel", then the recurring chilling effect upon both parent companies and their subsidiaries is self-evident. Multifaceted businesses could not be structured in a manner appropriate to their complexity, and solvent operating companies would be loathe to protect their separate interests in an affiliate's reorganization. At the very least, such solvent affiliates and debtors would be hesitant to even discuss mutually agreeable terms of aiding in the reorganization process for fear of being estopped from complaining when the *non-debtor's* assets are confiscated.

The decision of the Eleventh Circuit Court of Appeals below has allowed all of the above to occur, in direct conflict with this Court's decisions, with those of other circuit courts of appeal, and with the jurisdictional commands of Congress. This was never a case of an attempt by creditors to allege that a subsidiary was a sham or mere alter ego, thus justifying a piercing of its corporate veil. No such allegations were ever made. Similarly, this was never a case of an attempted overt "substantive consolidation" of the non-debtor subsidiary with the debtor parent. The district court's order expressly held that there was no such consolidation [App. 13a]. The severe result of the series of decisions culminating in that of the court of appeals below is exactly the same as if such allegations had been not only made but proven.

This court should not allow this result to stand, with its significant unsettling effect on the structuring of business entities and commercial law.

III. By Affirming The Raising By The District Court Of Equitable Estoppel *Sua Sponte* On Appeal, The Court Below Has Vitiating Rules Of Procedure Promulgated By This Court And Significantly Departed From Accepted Standards Of Review.

The Eleventh Circuit Court of Appeals, in its March 18, 1988, *per curiam* affirmance, simply approved of the district court's use of the doctrine of equitable estoppel⁶ and made the conclusory statement that "the record abundantly supports the district court's findings." App. 4a. What has been lost in this process, however, is the fundamental fact that the district court did not make any findings of its own based upon receiving evidence or hearing testimony and was not reviewing any such findings of the bankruptcy court as to the issue of "equitable estoppel." In effect, there was no "record" below on which equitable estoppel could be based, since it was not raised, and the bankruptcy court took no such evidence. This is a total perversion of Rule 52(a) of the Federal Rules of Civil Procedure promulgated by this Court, requiring that a court make its own considered findings of fact on a given issue, based upon admissible evidence presented to it, and state those findings specially. Anything less is "an abandonment of the duty and the trust that has been placed in the judge by these rules." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964).

The sole basis given by the district court for its decision to affirm the bankruptcy court was the doctrine of equitable estoppel. Equitable estoppel was raised by the

⁶ Indeed, the court of appeals' one-line description of the district court appeal betrayed a fundamental lack of understanding of the parties' positions. The Court spoke of Petitioners being "equitably estopped with respect to *their claim* to the proceeds of Twin Development Corporation's assets." As set forth in the *Statement of the Case, supra*, Petitioners *never* made a claim to those assets. They have consistently maintained that the assets belong to Twin, a separate *non-debtor* corporation, and not to the Miami Center Liquidating Trust.

district court *sua sponte*—the doctrine was not pleaded by the Bank or the Trustee, and was not invoked by the bankruptcy court. The fact that the Bank, the Trustee and the bankruptcy court never mentioned equitable estoppel comes as no surprise—there was no basis for its application here.

The district court exceeded its authority by making the *sua sponte* decision to invoke the doctrine of equitable estoppel. Under Federal Rule of Civil Procedure 8(c), estoppel is an affirmative defense which must be pleaded and proved in the court of original jurisdiction. See F.R.C.P. 8(c) (“in pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel”). A Florida appellate court applying a virtually identical Florida rule⁷ has reversed as improper a trial court’s *sua sponte* order invoking equitable estoppel. *Cox v. Holden*, 345 So.2d 846 (Fla. App. Dist. 1, 1973). Also highly illustrative is the recent decision of the Ninth Circuit Court of appeals in *In re Golden Plan of California, Inc.* 829 F.2d 705 (1986). Like the case at bar, the *Golden Plan* case involved an appeal from a bankruptcy court’s decision, in which the district court attempted to dispose of the case on an issue (in that case, fraudulent conveyance) never considered by the court below nor specifically raised by the parties on appeal. The Ninth Circuit reversed, holding as follows:

“The district court’s *sua sponte* consideration of the fraudulent conveyance issue also rendered the proceedings procedurally defective, because the investors were denied adequate notice. The trustee’s pleadings contained no allegations that the advances were fraudulent conveyances in violation of Section 548. The investors were therefore denied adequate notice and opportunity to prepare a proper defense.”

⁷ In Florida, equitable estoppel must be specifically alleged by the party seeking to rely on it as a defense. See *Department of Revenue v. Hobbs*, 368 So.2d 367 (Fla. App. Dist. 1 1979), *appeal dismissed without opinion*, 378 So.2d 345 (Fla. 1979); see also *Phoenix Insurance Company v. McQueen*, 286 So.2d 570 (Fla. App. Dist. 1 1973).

829 F.2d at 712, citing *Slone v. Abraham (In re Prestige Spring Corp.)*, 628 F.2d 840, 842 (4th Cir. 1980).

Clearly, then, neither the Ninth Circuit nor the Fourth Circuit would have permitted the *sua sponte* consideration of a dispositive issue of equitable estoppel in the case at bar. Thus, the Eleventh Circuit's actions present a conflict among these circuits, requiring resolution by this Court.

Indeed, the District Court's decision in this case provides a perfect example of why it is dangerous for appellate courts to raise equitable estoppel *sua sponte*. When the issue has not been briefed and no evidence taken below, there is a virtual certainty that appellate courts will make mistakes in reviewing what they perceive to be "facts." In the present case, it is abundantly clear that the circumstances failed to warrant the imposition of equitable estoppel. While the patent errors in the district court's analysis were set forth in detail to the Eleventh Circuit, the examples which follow are, for purposes of this Petition, sufficient to demonstrate the magnitude of the variance from truth which occurs when courts abandon their duty to take evidence and make considered findings.

The essential elements of equitable estoppel are straightforward: (a) words, acts, conduct or acquiescence by the party to be estopped that have the effect of misrepresenting material facts; (b) such words, acts, conduct or acquiescence by the party to be estopped are willful or negligent; and (c) the other party relies in good faith on such words, acts, conduct or acquiescence, and is harmed as a result of such reliance. See *Matter of Garfinkle*, 672 F.2d 1340, 1347 (11th Cir. 1982). See also *Irvine v. Cargill Investor Services, Inc.*, 799 F.2d 1461 (11th Cir. 1986); *Highland Ins. Co. v. Trinidad & Tobago (BWIA International Airways)*, 739 F.2d 536 (11th Cir. 1984); *Travelers Indem. Co. v. Swanson*, 662 F.2d 1098 (11th Cir. 1981); *Minerals & Chemicals Philipp Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir.

1969); *In re Sombrero Reef Club, Inc.*, 15 Bankr. 177 (Bankr. S.D. Fla. 1981).

Because equitable estoppel may bar the assertion of otherwise valid legal rights, it is not favored. The burden of proving such estoppel is placed on the party seeking to claim its protection. *Irvine v. Cargill Investor Services, Inc.*, *supra*, 799 F.2d at 1463; *Garner v. Pearson*, 545 F. Supp. 549 (M.D. Fla. 1982); *cf. Lyng v. Payne*, 476 U.S. 926, 106 S.Ct. 2333, 90 L.Ed. 2d 921; *reh. den.* — U.S. —, 107 S.Ct. 11 (1986). This burden is a heavy one—the standard of proof for estoppel is clear and convincing evidence. *See Barber v. Hatch*, 380 Co.2d 536 (Fla. App. 5th Dist. 1980); *Zimeri v. Citizens and Southern International Bank of New Orleans*, 664 F.2d 952, 955 (5th Cir. 1981) (equitable estoppel must be proved with “unusual clearness”). As the Florida Supreme Court has explained in *Enstrom v. Dunning*, 186 So. 806 (1939) (quoting 21 C.J. 1139, Sec. 139):

“Before any estoppel can be raised there must be certainty to every intent and the facts alleged to constitute it are not to be taken by argument or inference No one should be denied the right to set up the truth unless it is in plain contradiction of his former allegations or acts. If an act or admission is susceptible of two constructions, one of which is consistent with a right asserted by the party sought to be estopped, it forms no estoppel.”

A review of the facts of this case in light of the elements of equitable estoppel would quickly make clear that the District Court misapplied the doctrine. Even if the Trustee or the Bank had raised the defense, the heavy burden of proof could have been satisfied to prevent Petitioners from asserting otherwise valid legal claims.

The district court misconstrued the entire basis upon which Holywell granted to the Bank of New York an Assignment and Security Interest in Twin Development Corporation's stock, misstating the record as follows:

"On June 23, 1983, Holywell pledged, *inter alia*, Twin's stock to secure Holywell's guaranty of construction loans made to Holywell by the Bank." App. 6a.

The borrower of the subject construction loan was MCLP. Holywell was a guarantor of the recourse portion of the loans in the purported face amount of \$105,586,027.03 plus accrued interest. By operation of law and the confirmed Plan's provisions, Holywell's guaranty of MCLP's construction loan was released upon the sale of the Miami Center to the Bank's designee for \$255.6 million.

Despite the district court's statement to the contrary, Petitioners Holywell and Gould did not repeatedly misrepresent their position regarding the use of the Twin assets by suggesting "that the proceeds from the Washington Properties allocable to Twin would be available to creditors in satisfying claims against their estates." App. 10a. The examples provided by the district court do not support its conclusion.

The district court's first example of a purported misrepresentation, *see* App. 25a, is a statement taken from the motion by Holywell and Gould seeking approval to take the necessary steps as *partners* and *stockholders* of the Seller entities to complete the sale of the Washington Properties, arguing that the sale was in the best interest of the Debtors and their creditors because:

the immediate cash infusion from such sale[,] *which inures to Holywell and Gould*[,] [would] provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings. App. 10a. (emphasis added).⁸

Holywell and Gould were suggesting only that their *own* funds might be useful. Nothing was said concerning assets of the solvent non-debtor Twin.

⁸ It should be noted that the bracketed commas in this passage did not exist in the motion, and the district court has materially distorted the meaning by choosing, inexplicably, to insert them.

Debtors Holywell and Gould were to receive substantial distributions totalling \$16,635,026 from the sale of the Washington Properties, completely independent from the proceeds to be received by Twin. They believed these funds would be sufficient to pay all creditors' claims. Moreover, the Debtors were not offering to use the funds in connection with the Bank's Plan, but rather in connection with their own plans of reorganization. They never suggested that the cash could be confiscated and used by any party for any purpose, no matter whose reorganization plan was adopted.

The district court next asserted that Holywell's disclosure statement and proposed plan "made manifest to the court and creditors" that Twin's funds would be used to pay the Debtors' creditors. App. 11a. There is, however, no such statement in Holywell's plan. Holywell's plan states only that:

"This Debtor [i.e. Holywell Corporation] . . . would make loans to Miami Center Limited Partnership, Chopin Associates and Theodore B. Gould for the sole purpose of paying the Allowed Claims of the secured and unsecured creditors of those estates" Bkey. Ct. Docket ##337-381, 466 (Holywell plan of reorganization, p. 7).

The plans of Debtors MCLP, Chopin and Gould made consistent statements to the effect that funds necessary for the satisfaction of claims against MCLP would be derived in part from a "loan of approximately \$10,000,000 in cash which *Holywell Corporation* has placed in a segregated interest bearing account." (MCC plan p. 7, Gould plan p. 8, MCLP plan p. 8). These plans further stated that "Holywell Corporation then would make loans to Miami Center Limited Partnership and Chopin Associates for the sole purpose of paying the Allowed Claims of the secured and unsecured creditors of those estates" (MCC plan p. 8, Chopin plan p. 8, MCPL plan p. 9, Gould plan p. 9). None of the Debtors' plans expressed an intent to use the *assets of Twin* for that purpose. The language of the Debtors' plans could not have been

more clear—the district court badly mischaracterized them.

The district court also cited as an “instance of express representation” that Gould “testified in bankruptcy court that Twin proceeds ‘had to go to Holywell as dividends,’ thus suggesting those funds would be appropriate for the satisfaction of creditors’ claims.” App. 10a. The district court misunderstood this testimony, given on February 11, 1985, in a deposition pursuant to Bankruptcy Rule 2004, and not at the hearing from which this appeal arose, as wrongly implied by the court. As the context of the testimony clearly indicates, when Gould stated that Twin assets “had to go to Holywell as dividends,” he did not mean that dividending was somehow mandatory or an essential part of the Debtors’ plans, but rather that a dividend was the *only way* Holywell could obtain such funds. App. 52a. That this interpretation is the correct one is supported by the fact that counsel for Gould observed immediately thereafter on the record at the deposition that Twin’s proceeds had *not* been distributed as a dividend to Holywell. App. 52a.

In addition, the district court cited examples of situations in which it believed that “Gould and Holywell acquiesced in the Bank’s justifiable presumption that Twin’s proceeds from the Washington properties would be included within the debtor’s estates.” App. 12a. These allegations of misrepresentation by acquiescence have no basis in fact.

The district court begins by pointing to the orders of the bankruptcy court requiring the Washington Properties proceeds to be put in segregated accounts and treated as “cash collateral” for the Bank’s mortgage lien. The district court sees acquiescence in the fact that no appeal from these orders was taken by Holywell and Gould. The district court’s observation reflects a basic misunderstanding as to the nature of these orders. The bankruptcy court’s orders were not final, were limited to noting that the Bank of New York *appeared* to have a first lien on the net proceeds due *Holywell and Gould*, and that this lien

remained subject to any later contest as to its validity and priority. App. 22a.

The bankruptcy court did not grant the Bank a first lien on Twin's proceeds—the Bank only had a security interest in Twin's stock as additional collateral for repayment of its pre-petition loan. The orders did not provide for the confiscation of non-debtor Twin's assets. They simply required that they be segregated so long as the Bank's mortgage lien existed. App. 19a and 23a. The plans being formulated by both the bank and the Debtors at that time contemplated a cash sale of the real estate, the release of the underlying mortgage lien, and the release of the related lien on the Twin stock. Indeed, the "Cash Collateral Order" of December 31, 1984, expressly recognized that third party liabilities, including substantial Federal income tax liabilities of Twin and other selling entities would have to be "determined and paid" out of those proceeds. App. 22a.

The manner in which Petitioners Holywell and Gould implemented the orders clearly demonstrates that they took the view that Twin's assets were separate and distinct from their assets and not to be commingled. Holywell, Gould, and Twin ensured that Twin's proceeds were kept in a separate account in the name of Twin. In September 1985, while the Bank's mortgage lien was still outstanding, Twin purchased six-month Treasury Bills in its own name with those proceeds, still keeping the funds intact and segregated.

The district court's next example of acquiescence is unfathomable. It asserts that "the appellants did not enter any objections to the Bank's Plan, and after the bankruptcy court approved the Bank's plan, they did not raise the issue presently at bar on appeal." App. 11a. But the Debtors filed many objections to the Bank's Plan.⁹ (Bankruptcy Court Docket Numbers 447, 534, 580, 678, 701, 809, 838, 839, 888a.) The Debtors took the view from

⁹ The bankruptcy court confirmed the plan without ever holding a hearing on the objections to the Bank's Plan.

the start that the Plan was unfair and inequitable to affiliated creditors, the Debtors, and Holywell's non-filed solvent corporate subsidiaries. The objections specifically referred to the unwarranted consolidation of the assets of solvent entities with those of insolvent entities. (e.g., Bankruptcy Docket No. 888a).

Objections to the treatment of Twin were made in the appeal from the confirmation order, despite the district court's assertion. The Debtors' brief stated as follows:

"In addition [substantive consolidation in the Bank's Plan] has been used to control and disburse \$14 million of Twin Development's assets for the benefit of the Bank's plan. Despite the fact that HLC, HTC and Twin Development are solvent companies and have not filed as debtors in the Chapter 11 proceeding, the Bankruptcy Court has taken the position that it has the authority to dispose of the assets of these companies because they are subsidiaries of Holywell and Gould is the sole stockholder of Holywell. This consolidation of non-filed entities with bankruptcy entities is particularly objectionable and contrary to law." Brief of Appellants in *Miami Center Limited Partnership, et al. v. The Bank of New York*, 59 Bankr. 340 (Bankr. S.D. Fla. 1986) at p. 37.

At various points in its order, the district court compounded its mistakes by stating that no objections were filed and that no appeal of the confirmation order was taken. App. 11a. It even goes so far as to state that Appellants failed "to appeal an order clarifying that the Twin proceeds could be used by the Liquidating Trustee" (App. 11a)—in other words, that they failed to appeal the very order that the district court was then reviewing.

Similarly, as was set forth in detail by Petitioners to the Eleventh Circuit, the district court purported to "find" non-existent or distorted "facts" on the elements of the "misleading of the Bank" and the Bank's "reliance to its detriment" App. 12a. To suggest the existence of these elements of equitable estoppel is, indeed, patently

absurd on its face in a situation where the Respondent Bank proposes and pushes through, by "cram down" a plan whereby it has its hand-picked "trustee" immediately sell it the Miami Center property and dismiss the Petitioners' Federal Civil Action.

The Court of Appeals refers to a "record" which was never made to support the imposition of a doctrine never plead. Rules 52a and 8c, as promulgated by this court have been effectively nullified. It is respectfully submitted by Petitioners that, in cases such as this, the departure from the accepted standards of review requires the exercise of this Court's supervisory power. *See e.g. Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed. 2d 630 (1974); *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672 ((1949), *aff'd on rehearing*, 339 U.S. 605, 70 S.Ct. 854, 94 L.Ed. 1097 (1950).

CONCLUSION

For all the foregoing reasons, the questions presented to this Court by the Petitioners are of such a special and important nature to warrant the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDICES



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5195

IN RE: HOLYWELL CORPORATION and
THEODORE B. GOULD,
Debtors.

HOLYWELL CORPORATION and THEODORE B. GOULD,
Plaintiffs-Appellants,

versus

FRED STANTON SMITH, Liquidating Trustee,
and BANK OF NEW YORK,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion ———, 11 Cir., 198—, — F.2d ———)

[Filed April 20, 1988]

Before VANCE and ANDERSON, *Circuit Judges*, and
*BROWN, *Senior Judge*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Anderson
United States Circuit Judge

* Senior Judge for the Fifth Circuit Court of Appeals, sitting by designation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5195

D.C. Docket No. 86-0848
IN RE: HOLYWELL CORPORATION and THEODORE B. GOULD,
Debtors.

HOLYWELL CORPORATION and THEODORE B. GOULD,
Plaintiffs-Appellants,

versus

FRED STANTON SMITH, Liquidating Trustee, and
BANK OF NEW YORK,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(March 18, 1988)

Before VANCE and ANDERSON, Circuit Judges, and
BROWN *, Senior Circuit Judge.

* Honorable John R. Brown, Senior U.S. Circuit Judge for the
Fifth Circuit, sitting by designation.

PER CURIAM:

The district court found that appellants were equitably estopped with respect to their claim to the proceeds of Twin Development Corporation's assets. We find no error in the district court's analysis, and the record abundantly supports the district court's findings. Appellants' other claims on appeal are frivolous.

AFFIRMED.¹

¹ The motion of appellee, Bank of New York, to dismiss the appeal as moot is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 86-0848-CIV-Ryskamp

HOLYWELL CORPORATION, and THEODORE B. GOULD,
v. *Debtor/Appellants,*

THE BANK OF NEW YORK AND FRED STANTON SMITH,
AS LIQUIDATING TRUSTEE,
Appellees.

ORDER AFFIRMING DECISION OF
THE BANKRUPTCY COURT

[Filed Feb. 20, 1987]

THIS CAUSE is before the court on appeal from a final order entered by the United States Bankruptcy Court for the Southern District of Florida.

I. *Parties and Facts*

The appellants are two of five debtors involved in chapter eleven bankruptcy proceedings in the bankruptcy court below.¹ These proceedings were apparently precipitated by the inadequate financing of a construction project called the "Miami Center Project", which the debtors had attempted to finance in part through a loan from the Bank of New York (hereinafter "Bank"). Ap-

¹ The three debtors that did not appeal are Miami Center Corporation, a wholly owned subsidiary of Holywell, Chopin Associates, a partnership of which Theodore B. Gould and Miami Center Corporation are the sole general partners, and Miami Center Limited Partnership, a limited partnership with Gould and the Miami Center Corporation acting as general partners.

pellant and debtor, Theodore B. Gould (hereinafter "Gould"), is the sole stockholder and president of appellant/debtor Holywell Corporation (hereinafter "Holywell"), which is the parent company of Twin Development Corporation (hereinafter "Twin"). Gould is also the president and one of the directors of Twin.

On June 23, 1983, Holywell pledged, *inter alia*, Twin's stock to secure Holywell's guaranty of construction loans made to Holywell by the Bank. Approximately seven months later, Holywell and the other debtors defaulted on their obligations to the Bank resulting in the filing of bankruptcy petitions by the debtors. The debtors default entitled the Bank to the unfettered right to plenary ownership of Twin's stock. Thereafter, on October 1, 1984, Holywell and Gould moved the bankruptcy court to authorize and approve the sale of certain specified real and personal property owned by Twin and four limited partnerships, all of which are controlled by Gould and Holywell. The bankruptcy court entered an order approving and authorizing Holywell and Gould to consummate the sale of the "Washington properties".² Subsequently, the bankruptcy court directed Holywell to cause Twin to deposit into a segregated account, any funds payable to Twin from the sale of the Washington properties, and adjudged that the Bank had a first lien on the net proceeds owed Holywell, Gould, and Twin, from the sale of that property.

After the sale of the Washington properties, the bankruptcy court adopted the plan of reorganization submitted by the Bank. The Bank's plan consisted of the ap-

² The "Washington properties" refer to three office buildings located in the Washington, D.C., locality, which became a part of the assets of Twin, and four limited partnerships, all of which are owned by Gould and Holywell. Twin received its portion of the one hundred twelve million dollars in cash proceeds from the sale of the Washington properties, which sum is presently at issue on this appeal.

pointment of a liquidating trustee, who would be empowered to sell the Miami Center Project to the Bank, in lieu of the Bank's claims against the debtors. That plan was then affirmed on appeal by the district court in a thorough and detailed analysis by Judge Aronovitz (see case no. 85-3225-Civ-Aronovitz).

Finally, on January 28, 1986, the bankruptcy court entered an order granting the liquidating trustee, under the plan of reorganization, sole and complete authority over the Washington properties proceeds segregated in a bank account in Twin's name. This order was necessitated by Gould's contention that the liquidating trustee was without authority to effect the assets of Twin. From this order, Gould and Holywell appeal.

II. *Jurisdiction and Mootness*

The subject matter jurisdiction of this court has been invoked by the appellants pursuant to 28 U.S.C. § 158, which grants district courts of the United States jurisdiction to hear appeals from final orders of bankruptcy judges in cases brought under title eleven of the United States Code. At the threshold, the appellees urge this court to decline the exercise of jurisdiction over this appeal, for they contend this appeal is moot. The appellees stress two points relating to the mootness of this appeal: First, they contend that the appellant's neglect in procuring an order staying the implementation of the plan of reorganization, submitted by the Bank and accepted by the bankruptcy court, is fatal to this appeal; second, the appellees maintain that the plan of reorganization has been "substantially consummated", as that phrase is defined in 11 U.S.C. § 1101(2), and this appeal should be dismissed as moot, since the liquidating trustee's funds have been depleted.

Respecting the appellees first contention on mootness, this court is unwilling to apply a per se rule which demands that a party secure a stay of a bankruptcy order

to ensure its appealability. "Determinations of mootness . . . cannot be cabined by inflexible, formalistic rules, but instead require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail". *In re AOV Industries, Inc., v. Hawley Fuel Coalmart, Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir. 1986). Accordingly, the inquiry on mootness should focus on the feasibility or impossibility of effective relief to the appellants, in light of the appellees assertion that the plan of reorganization has been consummated. Although it appears that the plan of reorganization has been implemented to a large extent, and the precise portion of Twin's proceeds from the sale of the Washington properties may not be identifiable from other funds in the debtors' estates, this court nevertheless concludes that effective relief is possible. This conclusion derives from the most recent report submitted by the liquidating trustee to the bankruptcy court indicating a surplus in excess of two million dollars in the debtors' estates. If this court were to conclude that the bankruptcy court erred in ordering that the liquidating trustee be entrusted with custody of Twin's funds, it is clear that the power to effect the surplusage in the debtors' estates would lie within this court's discretion. Consequently, this court rules that the instant appeal is not moot, and the exercise of jurisdiction over this appeal pursuant to 28 U.S.C. § 158 is proper.

III. *Standard of Review*

Appellate review of the bankruptcy court's order granting the liquidating trustee complete custody of Twin's funds is guided by two standards. First, as to findings of fact made by the bankruptcy court, they shall be affirmed unless it is demonstrated that they are clearly erroneous. Bankruptcy Rule 8013. Contrarily, the resolution of legal issues by the court below are subject to *de novo* review by this court. See *In re Matter of Butkin Bros., Inc.*, 757 F.2d 1573 (5th Cir. 1985).

IV. *Equitable Estoppel*

This court is cognizant of the equitable nature of bankruptcy jurisdiction and the pervading invocation of equitable principles in the exercise thereof. *Marin v. England*, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966). In the instant appeal, it appears that the doctrine of equitable estoppel, a widely used equity concept in bankruptcy, as well as in other areas of the law, should be imposed against the appellant in affirming the order of the bankruptcy court below.

Essentially, equitable estoppel is a legal proposition which precludes a litigant from adhering to a position that is inconsistent with, or contradicted by, his statements, affirmative conduct, or acquiescence. The touchstone of estoppel lies in concepts of fair play and justice, see, e.g., *Schatzman v. Department of Health and Rehabilitative Services (In re King Memorial Hospital)*, 19 Bankr. 885, 891 (Bankr. S.D. Fla. 1982), although its use is circumscribed to instances where certain technical requirements are present. Gould and Holywell have taken a position through their representations and conduct which contravenes both the legal stance they now assert on appeal and the one which they argued to the bankruptcy court. But prior to deciding estoppel is apposite based on fairness notions, the requirements of that doctrine must be closely examined.

The basic elements that must be established to properly invoke estoppel entail the following: "(1) words, acts, conduct, or acquiescence, causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated." *Dooley v. Weil (In re Matter of Garfinkle)*, 672 F.2d 1340, 1347 (11th Cir. 1982); see also, *Minerals & Chemicals Philipp Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir. 1969).

It is ineluctably clear that the first formal element of estoppel is present in the instant appeal. The appellants have repeatedly made representations to the effect of acknowledging that the proceeds from the Washington properties allocable to Twin would be available to creditors in satisfying claims against their estates in bankruptcy. For instance, Gould and Holywell represented to the bankruptcy court, the Bank, and numerous other creditors, that the sale of the Washington properties was

in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale[,] which inures to Holywell and Gould[,] [would] provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings.

Debtor/Appellants' brief, pg. 3.

Further, prior to the adoption of a reorganization plan by the bankruptcy court, Holywell and Gould submitted disclosure statements and proposed a plan of reorganization. The Holywell disclosure statement made manifest to the court and creditors alike, including the Bank, that the cash proceeds derived from the sale of the Washington properties apportionable to Twin would serve as a source of funds for creditors' claims (see record, No. 466, pg. 4). Additionally, the appellants filed certificates with the bankruptcy court relating to their proposed plans of reorganization, revealing that funds in excess of fourteen million dollars, including Twin's proceeds from the Washington properties located in a segregated bank account, would be assessable to quench claims of creditors. Indeed, Gould even testified in bankruptcy court that the Twin proceeds "had to go to Holywell as dividends", thus suggesting those funds would be appropriate for the satisfaction of creditors' claims (see record, No. 385h, pgs. 49-50).

In addition to these express representations, Gould and Holywell acquiesced in the Bank's justifiable presumption

that Twin's proceeds from the Washington properties would be included within the debtors' estates. For example, the bankruptcy court directed Holywell to deposit into a segregated account any net funds payable to Twin from the sale of the Washington properties. Neither Gould nor Holywell appealed this order by the bankruptcy court, but rather tacitly accepted the order of the court. Moreover, after the Bank moved for a determination that all funds, including the Twin proceeds, were cash collateral subject to the Bank's lien, the bankruptcy court ordered that the proceeds constituted "cash collateral as defined in § 363 of the Bankruptcy Code" (see debtor/appellant brief, pg. 79). Neither Gould nor Holywell took appeal from this order.

Subsequently, the Bank filed its proposed plan of reorganization, which directed that the proceeds from the Washington properties attributable to Twin be incorporated with funds in the Miami Center Liquidating Trust and serve as a font for permissible claims against the debtors' estates. The appellants did not enter any objections to the Bank's plan, and after the bankruptcy court approved the Bank's plan, they did not raise the issue presently at bar on appeal.

In totality, the express statements made by Gould and Holywell, amalgamated with their conduct and acquiescence respecting the availability of Twin's proceeds from the sale of the Washington properties, results in the conclusion that their representations caused the Bank to believe in, and rely on, the existence of a certain state of things: namely, that the Twin funds could be applied to creditors' claims against the liquidation fund established by the bankruptcy court. Accordingly, the first element of estoppel is satisfied.

The second element of estoppel requires a finding that the party against whom the doctrine is imposed acted willfully or negligently with regard to their statements, acts,

and acquiescence. *Dooley*, 672 F.2d at 1347. There can be no doubt that Hollywell and Gould were, at the very least, negligent in not informing the Bank prior to this motion before the bankruptcy court that it did not intend to allow Twin's proceeds to be applied to creditors' claims. In point of fact, there is a strong inference stemming from Hollywell's disclosure statement, the appellants' proposed plan of reorganization, Gould and Hollywell's statement that the sale of the Washington properties would be beneficial to creditors, and Gould's testimony, that the actions of Gould and Hollywell were willful. In any event, it seems indisputable that Gould and Hollywell failed to conduct themselves in a reasonable manner; by neglecting to object to the numerous orders of the bankruptcy court establishing the propriety of applying Twin's proceeds to creditors' claims, and by concealing from the Bank their true intention to thwart such a use of the proceeds if at all legally possible, the appellants evidenced the requisite intent under equitable estoppel.

The third element of estoppel engages the court in an inquiry whether the party to whom representations have been made detrimentally relied upon the state of things as indicated by the representer. *Dooley*, 672 F.2d at 1347. For this element to be met, the Bank must have detrimentally relied on the appellants' representations and conduct. The appellants' statement that the sale of the Washington properties would accrue to the ultimate benefit of creditors, by providing a cash infusion to the debtors' estates, was relied upon by the Bank in deciding not to object to the sale of the Washington properties. Likewise, the Bank relied on Hollywell's disclosure statement, the appellants' failure to complain about the Bank's plan of reorganization and the order adopting that plan, the appellants' failure to appeal an order clarifying that the Twin proceeds could be used by the liquidating trustees, and Gould's testimony, all of which suggested expressly or implicitly that Twin's share of the proceeds from the

sale of the Washington properties was available for payment to creditors.

Moreover, the Bank acted upon these statements and the appellants' conduct by distributing a large segment of Twin's funds to creditors. To countenance the legal position assumed by the appellants would cause great detriment to the Bank. The Bank would likely be held responsible for reacquiring any funds paid out of Twin's funds. The Bank's detrimental reliance upon the conduct of the appellants is therefore most patently illustrated by its authorization and distribution of Twin's funds to creditors.

V. Conclusion

Consequently, this court is certain that the imposition of equitable estoppel against the appellants is dictated by precepts of equity, justice and fair play, and accords with the technical elements established in *Dooley*. Gould and Holywell have taken a posture which is surely inconsistent with their express statements and conduct, which led the Bank to distribute the Twin proceeds; the Bank's detrimental reliance on the appellants' representations leads this court to the inexorable conclusion that the appellants cannot maintain their position in this court of law.

In affirming the decision of the bankruptcy court on equitable estoppel grounds, this court pretermitted any discussion of substantive consolidation. However, it is apparent to this court that the reorganization plan of the bankruptcy court did not "substantively consolidate" Twin within the meaning of that term in § 105 of the Bankruptcy Code; Twin's assets and liabilities, with the exception of the proceeds from the sale of the Washington properties, remained wholly intact under the plan of reorganization. Furthermore, assuming substantive consolidation of Twin did occur under the plan adopted by the bankruptcy court, the factors enumerated in *In re Donut Queen Ltd.*, 41 Bankr. 706, 709 (Bankr. E.D.N.Y. 1984),

would militate in favor of upholding such action by the bankruptcy court.

Therefore, after-careful review and consideration of the record and the court being fully advised in the premises it is hereby;

ORDERED and ADJUDGED that the appeal from the final order of the bankruptcy court granting the liquidating trustee complete control over Twin's proceeds arising from the sale of the Washington properties is affirmed.

DONE and ORDERED at the United States District Court, Miami, Florida this 20 day of February, 1987.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
United States District Court

copies furnished to:
all counsel of record

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al*,
Debtors.

ORDER ON EMERGENCY MOTION FOR
CLARIFICATION AND LIQUIDATING
TRUSTEE'S RESPONSE THERETO

Theodore B. Gould moved this Court on an emergency basis for clarification as to the status of ownership and control of two United States Treasury Bills held in the Twin Development Corporation account No. 0002842207 at Florida National Bank of Miami, having a par value of \$13,949,000.

Fred Stanton Smith, Liquidating Trustee made reply to said Emergency Motion and further moved this Court to enter its order to show cause directed to Theodore B. Gould as to why he should not be cited to the United States District Court for the Southern District of Florida for contempt.

The Court set the matter for hearing on short notice, and having heard argument of counsel for Mr. Gould

and the Liquidating Trustee, and in accordance with the observations made by this Court during said hearing, and the Court being fully advised in the premises, it is hereby

ORDERED that Fred Stanton Smith, Liquidating Trustee of the Miami Center Liquidating Trust, is the sole and only party under the orders of this Court, to the exclusion of all others, that may direct the Florida Bank of Miami, its officers, agents and servants, to encash the United States Treasury Bills in account No. 0002842207, which account is in the name of Twin Development Corporation, and to distribute the proceeds of said encashment in accordance with the Amended Consolidated Plan of Reorganization, as Amended, confirmed by this Court on August 8, 1985. It is further

ORDERED that the Liquidating Trustee's application for an order to show cause directed to Theodore B. Gould as to why he should not be cited to the United States District Court for the Southern District of Florida for contempt, be and the same is hereby denied.

DONE and ORDERED at Miami, Florida, this 28th day of January, 1986.

/s/ Thomas C. Britton
United States Bankruptcy Judge

Copies furnished to

Fred H. Kent, Jr., Esq.

Irving M. Wolff, Esq.

Fred Stanton Smith, Liquidating Trustee
Florida National Bank of Miami

APPENDIX E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Cases Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE HOLYWELL CORPORATION, *et al.*,
Debtors

ORDER RESPECTING FUNDS RECEIVED BY THE-
ODORE B. GOULD, HOLYWELL CORPORATION
AND RELATED ENTITIES IN CONNECTION WITH
THE SALE OF CERTAIN REAL AND PERSONAL
PROPERTY PURSUANT TO A PURCHASE AGREE-
MENT DATED AS OF JULY 26, 1984, AS AMENDED,
TO BE DEPOSITED INTO A SEGREGATED AC-
COUNT

Upon the Motion of The Bank of New York (the
"Bank") for an order to require Theodore B. Gould,
("Gould") and/or Holywell Corporation, ("Holywell")
to cause all funds received by related entities in connec-
tion with the sale of certain real property pursuant to
a Purchase Agreement dated as of July 26, 1984, as
amended, to be deposited into a segregated account; the
Court having heard and considered the said Motion on
December 10, 1984, upon notice to parties in interest and

counsel of record; good cause having been shown, it is ordered as follows:

1. Holywell shall cause Twin Development Corp. ("Twin"), a wholly owned subsidiary of Holywell, to deposit into a segregated account, subject to further order of this Court, any net funds payable to Twin from the sale of certain improved real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended August 26, 1984, between Hadid Investment Group, Inc., as purchaser and Twin, 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Eleven Dupont Circle Associates and Dupont Land Associates as sellers (the "Purchase Agreement").

2. Holywell shall cause to be deposited in such segregated account, subject to further order of this Court any net funds payable to the following wholly-owned subsidiaries of Holywell: Whitehall Security Corporation, Orion Cleaning Services, Inc., Orion Mechanical Services, Inc., Holywell Management Company, Holywell Management of Washington, Inc., HWL Corporation, Parkwell, Inc., CMI Corporation, NHA Corporation, PBA, Inc., as a result of the premature cancellation of the service contracts referred to in Exhibit H to the Purchase Agreement, or otherwise payable in connection with the sale of the Washington Properties, or any other entity in which Holywell, or Gould hold any interest of any nature whatsoever.

3. Holywell and Gould shall deposit all funds, including any beneficiary interest, into a segregated account, subject to further order of this Court including any and all funds payable to or by Gould, Holywell or to any other entity or entities which are owned (wholly or partially) or controlled (wholly or partially) by Holywell and/or Gould as a result of the sale of the Washington Properties. The funds shall not include the proceeds

payable to any independent person or entity in which neither Gould, Holywell, nor any related entity has any interest of any nature whatsoever.

4. Holywell and Gould shall cause all net funds payable into such segregated account pursuant to paragraphs 1, 2 and 3 above to be invested in accordance with § 345 of the Bankruptcy Code and subject to any claim of lien by Bank of New York and subject to further order of this Court. The interest on such funds may be used with prior approval of the court for operation of the Miami Center subject to the prior orders of court in regard to use of income. However the transfer and use shall not prejudice any security, lien or future claim by any creditor.

5. Holywell and Gould shall furnish the following to the Bank and to the Official Creditors' Committees of Gould and Holywell at least 5 days prior to the closing of the sale of the Washington Properties:

- a) a copy of the proposed closing argument;
- b) a statement prepared by Touche Ross & Co. setting forth a detailed breakdown of the proposed payments and distributions to be made to Gould, Holywell, Twin, 1300 North 17th Street Associates, 1616 Remine Limited Partnership, 11 Dupont Circle Associates, Dupont Land Associates, and any other entity or entities owned or controlled (wholly or partially; and directly or indirectly) by Gould and/or Holywell; and
- c) a sworn statement of Gould that neither, he nor any of the other debtors herein has any interest (whether direct or indirect) in any entity receiving funds set forth in the Touche Ross & Co. statement delivered pursuant to paragraph (b) above except as specifically set forth therein.

20a

Done and Ordered this 11th day of December, 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
United States Bankruptcy Judge

Copies furnished to:

All members of creditors' committees

Counsel of record

All parties on attached list

APPENDIX F

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

Cases Nos.: 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

**ORDER ON EMERGENCY MOTION TO TREAT
PROCEEDS OF THE SALE AS CASH COLLATERAL,
TO SEGREGATE AND ACCOUNT
FOR CASH COLLATERAL**

The Bank of New York ("BNY"), a secured creditor, moved this Court, pursuant to Bankruptcy Code § 363 and Bankruptcy Rules 4001 and 9014, for an order to compel the Debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Remine Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle"), and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") as cash collateral.

The Court examined the memoranda which were filed both in support of and in opposition to the Motion of BNY, and having heard representation by the attorneys for Debtors, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), as well as argument by the parties hereto, the Court finds as follows:

(a) This Court entered an Order on the 11th day of December, 1984, requiring that all of the beneficial interests of Gould and Holywell to the net proceeds from the sale of the Washington Properties are to be placed in a segregated, interest bearing account and held pursuant to further order of this Court.

(b) BNY appears to have a first lien on the interests of Holywell and Gould in the net proceeds from the sale of the Washington Properties, except for an amount of \$264,669. Attorneys for the Creditors' Committees did not object to the claim of BNY at this hearing, although they have reserved the right to contest BNY's claim to a first lien at a future time if they desire to do so.

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.

(d) Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of that sale and any interest it may receive from the investment of those net proceeds. Therefore, Holywell requires the use of a portion of the net proceeds of that sale in the immediate future to pay current, ordinary business expenses, including salaries, and will continue to require monies from either the net

proceeds of the sale or interest income from the investment of those proceeds until such time as Holywell can wind up the affairs of those selling entities.

(e) BNY has agreed to the use of the proceeds of the sale and/or interest for the expenses of Holywell subject to the prior approval by BNY of those expenses, and has agreed to an amount of \$70,000 to be released immediately for the payment of December salaries payable on December 31, 1984, and other business expenses payable in January, 1985.

Upon consideration of the following, it is ORDERED and ADJUDGED as follows:

1. This Court's Order of December 11, 1984 shall continue unchanged except as supplemented herein.
2. The net proceeds of the Washington sale constitute cash collateral as defined in § 363 of the Bankruptcy Code.
3. The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of \$264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank of New York in subsequent, appropriate proceedings.
4. An amount of \$70,000 shall be released immediately to Holywell to pay its salaries and other business expenses due on December 31, 1984 and during January 1985.
5. Holywell shall submit to the Bank of New York each month its anticipated expenses, including salaries, for the subsequent month. If the Bank of New York approves those expenses as submitted, they will be released without further order of this Court.

24a

DONE and ORDERED in Miami, Florida this 31 day
of December 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esq.
All Members of the Creditors' Committees
All Attorneys of Record
Service of this Order to be performed
by Fred H. Kent, Jr.

APPENDIX G

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-TCB
through 84-01594-BKC-TCB

Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors

ORDER APPROVING AND AUTHORIZING HOLY-
WELL CORPORATION AND THEODORE B. GOULD
TO CONSUMMATE THE SALE OF CERTAIN REAL
ESTATE AND PERSONAL PROPERTY AND DI-
RECTING SEGREGATION OF NET PROCEEDS
DUE HOLYWELL CORPORATION AND THEO-
DORE B. GOULD

Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), debtors and debtors-in-possession, having moved this Court by motion dated September 28, 1984, for an order approving and authorizing Holywell and Gould to consummate the sale of certain real and personal property (the "Real and Personal Property") owned by Holywell and Gould as partners and stockholders in Twin Limited Partnership, Eleven DuPont Circle Associates and DuPont Land Associates "Sellers"); and due and timely notice of the hearing on the Motion having been given in accordance with Rule 2002 (i), Bankruptcy Rules, pursuant to an Order of this

Court dated October 1, 1984; and a hearing having been held before me on October 22, 1984, to consider the Motion; and after hearing counsel for Holywell and Gould in support of the Motion and counsel for those parties who filed objections herein in opposition thereto; and upon the record and minutes taken before me at the hearing; and after due deliberation and sufficient cause appearing therefor; it is

NOW, on motion of Kent, Watts, Durden, Kent, Nichols & Mickler, attorneys for Holywell and Gould,

ORDERED AND ADJUDGED, that:

1. Holywell and Gould be, and they hereby are, authorized and empowered to consummate the sale of the Real and Personal Property to Hadid Investment Group, Inc., and/or assigns ("Hadid"), pursuant to the "Purchase Ageement" dated July 26, 1984, as amended by "First Amendment to Purchase Agreement" dated August 28, 1984, between Sellers and Hadid, a copy of each of which is annexed to the Motion:

2. Holywell and Gould be, and they hereby are, authorized and empowered to execute such documents and perform such other acts as may be necessary to consummate the sale as contemplated by the Purchase Agreement and the First Amendment to Purchase Agreement, including, but not limited to, the execution of any other agreements consistent with and in furtherance of such sale;

3. Holywell and Gould be, and they hereby are, directed to segregate the share of the net proceeds due Holywell and Gould from the sale of the Real and Personal Property approved by this Order and to invest such proceeds in accordance with § 345 of the Bankruptcy Code and hold same subject to further order of this Court.

27a

DONE AND ORDERED at Miami, Florida, this 22
day of October, 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

cc: All Members of all
Creditor's Committees
All Attorneys of Record
All Secured Creditors

APPENDIX H

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtor(s).

CONFIRMATION ORDER

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical plans. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Although conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B. R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better. The bank's plan rests upon a firm commitment by the bank to purchase the property for \$255.6 million. The

debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtors' debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

	Debtors' Plans	BONY Plan	
	97% Rejection	15%	Rejection
Holywell	97% Rejection	15%	"
MCLP	80% "	10%	"
MC Corp.	99% "	10%	"
Chopin	99% "	0.1%	"
Gould	80% "	12%	"

Each of the creditors' committees have elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits,

briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in and adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C. P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of \$14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order, I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtors' major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this

issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetition here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29. (C. P. No. 614). There was an addendum to that stipulation on the same day. (C. P. No. 564). A second addendum was agreed upon on May 30 (C. P. No. 709(c)), and a third addendum was agreed upon on July 30. (C. P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129(b)(1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under,

and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtors' plans.

DONE and ORDERED at Miami, Florida, this 8th day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esquire
John Kozyak, Esquire
Scott D. Sheftall, Esquire
Irving Wolff, Esquire
Thomas F. Noone, Esquire
Joel Aresty, Esquire
All Committees
Vance Salter, Esquire
All creditors

APPENDIX I

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED
PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN
ASSOCIATES, and THEODORE B. GOULD,

Debtors.

ORDER APPOINTING TRUSTEE

On August 8, 1985 the Court entered an order confirming the Amended Consolidated Plan of Reorganization proposed by The Bank of New York (the "Bank's Plan"). Article V of the Plan contemplates the establishment of a liquidating trust and the appointment of a Trustee for all property of the debtors.

The Bank of New York has nominated Fred Stanton Smith to serve as Trustee under the Bank's Plan. In accordance with the discussions among counsel in open Court on August 8, Mr. Smith has been introduced to counsel for the debtors and Olympia & York.

In the interest of assuring an orderly transition from the debtors-in-possession to the Trustee, it is hereby ORDERED that:

1. Fred Stanton Smith is hereby appointed as Trustee for purposes of the Bank's Plan.

2. Since motions for rehearing are anticipated and will not be heard until next month, for the time being:

(a) the Trustee's compensation and expenses shall be borne by the Bank;

(b) The Trustee shall not assume title to, and possession and control of the debtors' property and affairs as contemplated by the Bank's Plan until such time, if any, as the motions for rehearing on the confirmation order have been heard and determined; in the interim, the Trustee and his representatives shall have the power and right:

(1) Upon notice to the debtors-in-possession, to enter upon and inspect the debtors' premises in order to become familiar with debtors' operations, including, without limitation, the Miami Center buildings and operations;

(2) Review and copy all books and records of the debtors and their respective subsidiaries, including all records, relating to receipts and disbursements, all bank statements, checkbooks, ledgers, and other financial data;

(3) Discuss the affairs and business operations of the debtors and their respective subsidiaries with the officers, directors, employees, attorneys, accountants, agents, tenants, subtenants, of such entities in order to gain a thorough understanding of such affairs and operations; and

(4) Engage attorneys, accountants, and such further consultants as he may deem appropriate, providing notice of such retention to parties in interest, for the purpose of analyzing the legal rights and financial position of the debtors and their respective subsidiaries.

3. On or before the date the Trustee assumes possession and control of the debtors' property and affairs pursuant to the Plan, the Trustee shall:

(a) File with the Court and serve upon all parties in interest a written statement describing the proposed basis

for his compensation as Trustee and the identity of, and proposed compensation for, such attorneys, accountants, and consultants as have been retained by him. No compensation shall be payable to the Trustee or to any such attorney, accountant, or consultant from the assets of the debtors' estates until the Court has reviewed and heard any objections to such proposed compensation arrangements.

(b) Post a Trustee's bond in the amount of \$1,000,000.00 in form approved by the Court. All payments of claims by the Trustee shall be approved by Court order.

DONE AND ORDERED at Miami, Florida, this 12 day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

cc: Counsel and Parties per
Attached Service List

APPENDIX J

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED
PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN AS-
SOCIATES and THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTER
LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW
YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI
CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL
CORPORATION and THEODORE B. GOULD,

Defendants.

FINAL JUDGMENT

In conformity with the Findings of Fact and Conclu-
sions of Law of even date, it is hereby

ORDERED AND ADJUDGED that the liquidating trustee of the Miami Center Liquidating Trust is not responsible for filing federal income tax returns on behalf of the debtors or liable to the United States of America for federal income taxes, if any, due on gain realized from the sale of real estate in Washington or from the sale of the Miami Center in Miami, Florida.

DONE AND ORDERED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

copies to:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW
Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED
PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN AS-
SOCIATES and THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTER
LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW
YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI
CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL
CORPORATION and THEODORE B. GOULD.

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on before the Court upon the
Complaint of the liquidating trustee of the Miami Cen-
ter Liquidating Trust (the "trust") against the United

States of America (the "government"), the Bank of New York (the "bank"), Theodore Gould ("Gould"), Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Holywell Corporation (the "debtors") for a declaration of the responsibility of the trust to file and/or pay federal income taxes to the government upon gain realized from the sale of real estate and the Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of the witnesses, considered the arguments of counsel and being otherwise fully advised in the premises does hereby make the following Findings of Facts and Conclusions of Law:

The facts are not in serious dispute. The debtors filed voluntary chapter 11 petitions on August 22, 1984, and the cases were substantively consolidated for all purposes. Shortly after the commencement of the chapter 11 proceedings, the debtors moved the Court for an order authorizing consummation of a prepetition contract for the sale of real estate in Washington (the "Washington properties"). Pursuant to order of this Court, the sale closed in December, 1984 and January, 1985, with the net proceeds due to Gould, Holywell, and Twin Development Corporation, a wholly owned non-filed subsidiary of Holywell, being placed in controlled accounts. The Court determined the proceeds of the sale were subject to the bank's lien, and entered a cash collateral order.

Thereafter, both the debtors and the bank proposed plans of reorganization which utilized the proceeds from the preconfirmation sale of the Washington properties and the post-confirmation sale of another parcel of real estate (the "Miami Center") as the sources of funds for payment of creditors. However, neither plan expressly provided for the payment of federal income taxes, if any, due on gain realized from those sales. The bank's Amended Consolidated Plan of Reorganization (the "plan") was confirmed on August 8, 1985, and became

effective on October 10, 1985, after the debtors failed to supersede the order of confirmation. The confirmation order was affirmed by the district court, 59 Bankr. 340 (S.D. Fla. 1986), and the 11th Circuit Court of Appeals dismissed an appeal of the order as moot because the plan was substantially consummated. *Miami Center Limited Partnership v. Bank of New York*, Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988).

The confirmed plan creates a trust and requires that a liquidating trustee be appointed whose responsibilities include the identification and payment of all valid claims against the estate with the payment of the sum remaining to the debtors. The trust corpus consists of all the debtors' 11 U.S.C. Section 541(a) defined assets (including the stock of all the wholly-owned subsidiaries), and the Washington proceeds. Soon after the liquidating trustee took control of the trust, he sold the Miami Center to the bank's nominee and the proceeds became a part of the trust corpus.

The government was listed as a creditor. It was involved in other tax disputes with the debtors and had notice of the bankruptcy proceedings. The government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gain taxes. The government did none of these things.

As conceded by the government and the debtors, the trust is not a separate taxable entity. However, the government and the debtors argue that the trust is responsible for filing an income tax return on behalf of the debtors and to pay the tax due, pursuant to 26 U.S.C. §§ 6012(b)(3), (b)(4), and 6151. The government supports this position by arguing that the liquidating trustee is a "trustee in a case under title 11 of the United

States Code, or assignee . . .," under 26 U.S.C. § 6012 (b) (3), thereby subjecting the trust to liability for taxes. The government also argues that the trust is responsible for taxes under 26 U.S.C. § 6012(b) (4) because it is "a trust, or an estate of an individual under Chapter 7 or title 11 of the United States Code [and payment] should be made by the fiduciary thereof." 26 U.S.C. § 6012(b) (4) (bracketed material added). Both the government and the debtors principally rely upon *In the Matter of I. J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974) to support their argument that the trust is responsible for these taxes.

The liquidating trustee argues that 26 U.S.C. § 6012 (b) (3), (b) (4) and *I. J. Knight*, 501 F.2d 62 are not applicable because the liquidating trustee in the case *sub judice* is not a trustee in a case under title 11 of the United States Code. The liquidating trustee also argues that 26 U.S.C. §§ 6012(b) (3) and (b) (4) are not applicable because the trust is a grantor trust, as defined under Subpart E of Subchapter J of the Internal Revenue Code, 26 U.S.C. §§ 671-69 and as such the trust is not a taxable entity under the Internal Revenue Code. The liquidating trustee cites *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985), as support for his position that the trust is a grantor trust and therefore not responsible for filing tax returns or paying federal income taxes due, if any, on the sale of either the Miami Center or the Washington properties.

The *I. J. Knight* court found that a non-operating trustee appointed under Title 11 of the Bankruptcy Code was "liable for payment of federal taxes on income generated during liquidation and distribution of the bankrupt estate" pursuant to 26 U.S.C. § 6012(b) (3). *I.J. Knight*, 501 F.2d at 62. The reliance on *I.J. Knight* by the debtors and the government is misplaced for the Court finds that the liquidating trustee is not a trustee appointed in a case under title 11. The liquidating trus-

tee was appointed by the court as part of a confirmed plan of reorganization and his actions are limited to the powers granted to him in the plan and the order of confirmation. The plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan. Once that function is served, the liquidating trustee and the trust will cease to exist. Therefore the Court finds that the liquidating trustee, being a creature of a contract, is a contract trustee.

It is well-settled that tax statutes are "not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government." *Greyhound Corporation v. United States*, 495 F.2d 863 (9th Cir. 1974). The obvious reasoning for this rule of construction is that the power to tax is the power to destroy, and "Congress could very easily have manifested any other intent by a limiting or qualifying provision." *Frankel v. United States*, 192 F. Supp. 776 (D. Minn. 1961), affirmed, 302 F.2d 666 (8th Cir. 1962), cert. denied, 371 U.S. 903, 83 S.Ct. 209, 9 L.Ed.2d 165 (1962). Therefore the Court finds that the liquidating trustee is not liable for payment of federal taxes, if any are due, under 26 U.S.C. § 6012(b)(3) since by its language it applies only to a trustee in a case under title 11.

Furthermore, the Court finds that the liquidating trustee is not an assignee within the meaning of 26 U.S.C. § 6012(b)(3) or a fiduciary under 26 U.S.C. § 6012(b)(4). The liquidating trustee's duties and powers under the plan are limited. The liquidating trustee does not possess discretionary authority as to the disposition of plan's assets. The liquidating trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of the trust assets in accordance with the terms of the confirmed plan. The liquidating trustee's functions are more closely analogous to those of a disbursing agent

than to an assignee or a fiduciary and, as such, he is not subject to tax liability as provided in 26 U.S.C. §§ 6012(b)(3) or (b)(4). See *In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980).

Additionally, there was no assignment of the debtors' properties except as provided in the plan. The plan does not provide for the trust to file tax returns reflecting the sale of the properties in question or for the trust to pay taxes on those sales. If Congress had intended to hold a disbursing agent or contract trustee liable to file a tax return and to pay taxes, it could have explicitly provided for this in 26 U.S.C. §§ 6012(b)(3) and (b)(4) or elsewhere in the International Revenue Code. *Alan Wood Steel*, 7 Bankr. at 700. This court lacks authority to extend 26 U.S.C. §§ 6012(b)(3) or (b)(4) beyond the clear import of their language. See *Greyhound Corp.*, 495 F.2d 863 and *Alan Wood Steel*, 7 Bankr. 697.

The liquidating trustee and the trust are also not liable for any taxes that may be due and owing to the government because the trust is a grantor trust and, as such, it is not a taxable trust under the Internal Revenue Code. See Subpart E of Subchapter J, 26 U.S.C. §§ 671-79 and *Sonner*, 53 Bankr. 859. Under 26 U.S.C. §§ 671-79, a grantor who has retained specified powers exercisable without the approval or consent of an adverse party is considered the owner of the trust and is taxed individually. *United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983), *aff'd*, 761 F.2d 1056, 1060-61 (5th Cir. 1985). The retention of power is manifested by the grantor's or non-adverse party's ability to control the beneficial enjoyment of the corpus or the income therefrom, or to receive income from the trust. 26 U.S.C. § 675 and 677. An adverse party is defined as a party which has a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of its powers regarding the trust. 26 U.S.C.

§ 672(a). The liquidating trustee is not an adverse party under the Internal Revenue Code. 26 U.S.C. Section 672(a). *See also Buttorff*, 563 F. Supp. 450 and Treas. Reg. §§ 1.672(a)-(1a), (a)-1(b).

Pursuant to 26 U.S.C. § 677(a), the grantor of a trust is treated as the owner if the income of the trust is "or, in the discretion of the grantor or a non-adverse party, or both, may be" applied to discharge a legal obligation of the grantor. *Sonner*, 53 B.R. at 863; 26 U.S.C. § 677(a); Treas. Reg. § 1.677(a)-1(d). Here, the debtors are the grantors of the trust, pursuant to the confirmed plan. The debtors' property became the property of the bankruptcy estate upon the filing of the Chapter 11 petitions and that estate was transferred to the trust pursuant to the terms of the plan. The entirety of the trust—its corpus and any income earned therefrom—is required under the plan to be used to discharge the legal obligations of the debtors. Any remainder is required to be paid back to the discharged debtors.

Treas. Reg. § 1.677(a)-1(d) unequivocally states that a trust whose income is used to discharge a grantor's legal obligations is a grantor trust. Additionally, Treas. Reg. § 1.677(a)-1(d) specifies that if the grantor, or a non-adverse party may, in their discretion, use trust income to satisfy the grantor's legal obligations, the trust is a grantor trust. *See* Treas. Reg. § 1.677(a)-1(d) and 26 U.S.C. § 677(a).

For the trust to be considered a taxable entity, the trustee must have as one of his permitted powers discretion as to which of the grantor's legal obligations to satisfy. The liquidating trustee in this case has no such discretion. Under the plan and 11 U.S.C. § 1142(a) neither the liquidating trustee or the grantors/debtors possess the discretionary power to decide how to disburse the assets of the trust to satisfy the grantors/debtors' legal obligations. The confirmed plan delineates the exclusive method of disbursement to the creditors.

The *Sonner* case directly supports this analysis. In *Sonner*, the debtor's voluntary Chapter 11 proceeding resulted in a confirmed plan of reorganization which required the debtor to convey his interest in certain parcels of real estate to a creditors' trust. The creditors' trust provided for the liquidation of the real estate at specified prices for the benefit of the debtor's creditors, with any remainder to be conveyed back to the debtor. This is precisely what the confirmed plan in the instant case provided. Specifically, the creditors' trust in *Sonner* required the liquidating trustee to hold and distribute the proceeds from the sale of the debtor's real estate in accordance with the terms of the confirmed plan. Like the plan herein, the creditors' trust in *Sonner* did not provide for the payment of taxes. The issue in that case was "whether the creditors' trust is the entity responsible for the payment of tax resulting from the sale of the parcels of real estate." *Sonner*, 53 B.R. at 860. The *Sonner* court noted that the intent of the debtor and his creditors, as is the case herein, was to use the trust as a vehicle simply for the purpose of liquidating the properties to pay creditors, and to return any excess to the debtor.

The *Sonner* court held that the creditor's trust was not responsible for the payment of a capital gains tax resulting from the sale of property. 53 Bankr. at 866. The court held that the creditors trust was a grantor trust, as defined in Subchapter J of the Internal Revenue Code, and the grantor-debtor, as owner of the trust, was liable for the taxes. *Sonner*, 53 Bankr. at 866. The Court agrees with and therefore adopts the reasoning found in the *Sonner* case thereby finding that the liquidating trustee is not liable for payment of federal income taxes, if any, that were incurred by the sale of the Miami Center and the Washington properties since the trust is a grantor trust and a non-taxable entity under the Internal Revenue Code. *Sonner*, 52 Bankr. 859. See also *Stockton v.*

United States, 335 F. Supp. 984, 986 (C.D.Ca.1971) (where the purpose of the trust is to extinguish the grantor's indebtedness, the grantor is treated as the owner of the trust for income tax purposes and the trust is not considered a taxable entity).

For the Court to conclude otherwise would be inconsistent with the recent ruling by the Eleventh Circuit Court of Appeals in *Miami Center Limited Partnership v. Bank of New York*, Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988). The payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan. See 11 U.S.C. 1127(b); *In re Northampton Corp.*, 59 Bankr. 963, 968-69 (E.D. Pa. 1984); *In re Seminole Park & Fairgrounds, Inc.*, 505 F. 2d 1011, 1014 (5th Cir. 1974); See *in re Hayhall Trucking, Inc.*, 67 Bankr. 681,684 (Bankr.E.D.Mich. 1986); See also *Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697,701 (10th Cir. 1964); *In re At of Maine, Inc.*, 56 Bankr. 55, 57 (Bankr.D.Me. 1985); *In re Heatron*, 34 Bankr. 526 (Bankr.W.D.Mo. 1983).

As noted by the court in *Miami Center Limited Partnership* when dismissing the appeal, it is legally and practically impossible to unwind the confirmation of this plan or to otherwise restore the status quo. The Court will not allow a "piecemeal dismantling" of a reorganization plan. See *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir. 1978). The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracti-

cable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan.

In summary, the Court finds that the liquidating trustee is not responsible to file income tax returns or to pay income taxes, if any are due and owing, resulting from the sale of the Miami Center or the Washington properties.

A separate Final Judgment of even date has been entered in conformity herewith.

DATED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

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APPENDIX K

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

PROCEEDINGS IN CHAPTER 11

Case No: 84-01590-BKC-TCB
Case No: 84-01591-BKC-TCB
Case No: 84-01592-BKC-TCB
Case No: 84-01593-BKC-TCB
Case No: 84-01594-BKC-TCB

IN RE: MIAMI CENTER CORPORATION,
Debtor.

1200 Brickell Avenue,
Miami, Florida,
Monday, 9:48 a.m.,
February 11, 1985.

DEPOSITION OF THEODORE B. GOULD

taken on behalf of the Committee
of Unsecured Creditors of Miami
Center Limited Partnership

pursuant to Bankruptcy Rules 2004 and 9106

APPEARANCES:

HOLLAND & KNIGHT, by
IRVING M. WOLFF, ESQ., of counsel,

and

ROMA W. THEUS, II, ESQ., of counsel,
Attorneys for Committee of Unsecured Creditors
of Miami Center Limited Partnership.

KENT, WATTS & DURDEN, by
FRED KENT, JR., ESQ., of counsel,
Attorneys for Debtor.

STEEL, HECTOR & DAVIS, by
FRANCIS L. CARTER, ESQ., of counsel,

and

MEYER, WEISS, ROSE, ARKIN,
SHAMPANIER, ZIEGLER & BARASH, by
S. HARVEY ZIEGLER, ESQ., of counsel,
Attorneys for Bank of New York.

BLANK, ROME, COMISKY & McCAULEY, by
DAWN A. FINE, ESQ., of counsel,
Attorneys for Holywell Unsecured Creditors
Committee.

RICHARD TOUBY, ESQ.,
Attorney for Touby Painting, Inc.

WITNESS

Theodore B. Gould
(By Mr. Wolff)

DIRECT

4

* * * *

[49] Q. Has Miami Center Limited Partnership taken down all of the money in conneciton with the Bank of New York loan?

A. There may be a few thousand dollars that have not been taken down.

Q. Whitehall Pest Control, Inc.?

A. It performs the services at this project.

Q. What does it do?

A. It controls pests.

Q. This is one of the totally owned subsidiaries of Holywell?

A. Right.

Q. It is not listed as a creditor.

A. It is a service that is provided under the management contract.

Q. With whom?

A. With Holywell.

Q. Twin Development Corporation?

A. It's a wholly-owned subsidiary of Holywell.

Q. What does it do?

A. It owned the general partnership in 1300 [50] North 17th Street.

Q. That had something to do with the Washington property?

A. It is one of the buildings in the Washington area.

Q. If one of those subsidiaries had some money coming out of that closing, that would have gone to Holywell?

A. It has to go to Holywell as dividends.

Q. It is part of that money that is in escrow?

A. It is not in escrow.

Q. It is.

A. It is in escrow?

Q. It is all in escrow. It better be.

MR. KENT: It has not been dividended to Holywell.

THE WITNESS: I didn't realize the court order was an escrow agreement.

BY MR. WOLFF:

Q. NHA Corporation?

A. NHA was a partially-owned subsidiary—I think it is two-thirds owned by Holywell Corporation, and it is a general partner of property that we owned in Washington, D.C. called 1333 New Hampshire Avenue.

* * * *

APPENDIX L

RELEVANT CONSTITUTIONAL AND
STATUTORY PROVISIONS

1. Amendment V to the Constitution of the United States provides in relevant part:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The relevant provisions of the Bankruptcy Reform Act of 1978 (11 U.S.C. Section 101 *et seq.**) are as follows:

SECTION 105 (11 U.S.C. § 105)

§ 105. Power of Court:

(a) the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

* * *

SECTION 1104 (11 U.S.C. § 1104)

§ 1104. Appointment of trustee or examiner.

(a) At any time after the commencement of the case but before confirmation of a plan, on request

* The Chapter 11 Proceedings below were initiated on August 22, 1984. The 1984 Amendments to the Bankruptcy Code, with certain exceptions including Section 105, were made effective as to cases filed on or after October 10, 1985. Therefore, the Bankruptcy Code Sections set out in this paragraph 4 are in the form applicable to this case.

of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

* * *

SECTION 1123 (11 U.S.C. § 1123)

§ 1123. Contents of plan.

(a) A plan shall—

* * *

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's execution, . . .

* * *

SECTION 1128 (11 U.S.C. § 1128)

§ 1128. Confirmation hearing.

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) a party in interest may object to confirmation of a plan.

*SECTION 1129 (11 U.S.C. § 1129)**§ 1129. Confirmation of plan.*

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of the chapter.

(2) The proponent of the plan complies with the applicable provisions of this chapter.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

* * *

(7) With respect to each class—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such creditor's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

* * *

(10) At least one class of claims has accepted the plan, determined without including any acceptance of the plan by any insider holding a claim of such class.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(b) (1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

* * *

3. The relevant provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353) are as follows:

a. 28 U.S.C. § 1334(d) provides:

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

* * *

4. Rule 52(a) of the Federal Rules of Civil Procedure provides:

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court

shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 59; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except^t as provided in Rule 51(b).

5. Rule 8(c) of the Federal Rules of Civil Procedure provides in relevant part:

(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense. . . .



2
NO. 88-80

Supreme Court, U.S.
FILED

AUG 12 1988

JOSEPH F. SPANIOL, JR.
CLERK

in the
Supreme Court
of the
United States of America

OCTOBER TERM, 1987

**HOLYWELL CORPORATION and
THEODORE B. GOULD,**

Petitioners,

vs.

**FRED STANTON SMITH, Trustee
of the Miami Center Liquidating Trust, and
THE BANK OF NEW YORK,**

Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

**BRIEF IN OPPOSITION OF RESPONDENT,
THE BANK OF NEW YORK**

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ISSUES PRESENTED

I.

Does this Court lack jurisdiction?

II.

Did the lower courts correctly apply the doctrines of substantive consolidation and equitable estoppel to the facts of the case?

III.

Did the rulings of the lower courts violate certain rules of the Federal Rules of Civil Procedure?

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NO. 88-80

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of the
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OCTOBER TERM, 1987

HOLYWELL CORPORATION and
THEODORE B. GOULD,

Petitioners,

vs.

FRED STANTON SMITH, Trustee
of the Miami Center Liquidating Trust, and
THE BANK OF NEW YORK,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT,
THE BANK OF NEW YORK

INTRODUCTION

The Petitioners are two of five affiliated debtors in consolidated bankruptcy proceedings below, who have

presented their various claims and arguments over the past four years to:

Two different Bankruptcy Judges;

Ten different District Judges in over twenty separate appeals; and

Eight Judges of the United States Court of Appeals in four separate appeals and a Petition for Writ of Prohibition and Mandamus.

Petitioners, along with three other affiliated debtors, have also filed another Petition for Writ of Certiorari and a Petition for Writ of Mandamus—both of which are currently pending before this Court.¹

STATEMENT OF THE CASE

The opinion of the Eleventh Circuit upon which review is sought herein² was the culmination of proceedings below initiated by an Emergency Motion for Clarification filed in the Bankruptcy Court to collaterally attack the Bank of New York's (the "Bank") confirmed plan of reorganization (the "Plan"). The Petitioners, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould") along with three other related debtors—Miami Center Limited Partnership ("MCLP"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin") (collectively the "Debtors")—filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code on August 22, 1984. The Bankruptcy Court granted the Debtors' motion for joint administration.

¹Case Nos. 87-1988 and 87-1989. References to the Petitioners' appendix will be denoted as "____a," and references to the appendix to this Response will be denoted "App. ____."

²Opinion of March 18, 1988 in *Holywell Corp. v. Smith*, Case No. 87-5195. [3a].

The filing of the petitions automatically stayed the then-pending state court foreclosure suit brought against some of the Debtors by the Bank, as well as approximately 30 lawsuits and lien proceedings against the Debtors brought by contractors, suppliers, another bank, the IRS, the Dade County Tax Collector, Gould's partners, and others. 11 U.S.C. § 362. Over 400 creditors held claims totalling over \$350 million.

The Debtors and the Bank filed competing reorganization plans in the bankruptcy proceedings.³ The creditor committees and individual creditors overwhelmingly

³As the Eleventh Circuit aptly noted: "Although the five debtors submitted individual plans, the plans were virtually identical." *Miami Center Ltd Partnership v. Bank of New York*, 820 F.2d 376, 377 n.1 (11th Cir. 1987).

Pursuant to Supreme Court Rule 28.1, the following is a listing of the relationships of The Bank of New York.

1. Parent of the Bank—The Bank of New York Company, Inc.
2. "Affiliates" of the Bank are:

BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.V.
Affinity Group Marketing, Inc.
ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Co., Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

approved the Bank's Plan and rejected the Debtors' plans. The Bankruptcy Court subsequently confirmed the Bank's Plan, over the objection of Debtors and Debtors' affiliated entities' objections (the "Confirmation Order").

Gould owned 100% of the stock of Holywell and also served as President and a director of Holywell. In turn, Holywell owned 100% of the stock of MCC; Gould and MCC were the sole general partners of Chopin and of MCLP. All five Debtors were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami.

Holywell owned many subsidiaries other than MCC. One such non-debtor subsidiary, wholly-owned by Holywell, was Twin Development Corporation ("Twin"). Gould served as President and as a director of Twin.

The Bank was the construction lender for the Miami Center Project and held a secured claim in the bankruptcy proceedings for over \$240 million. In a pre-confirmation adversary proceeding to establish its lien, the Bank obtained a judgment for over \$234 million as of March 14, 1985, with interest accruing at over \$2 million per month thereafter. [App. A].

The Petitioners' statement of the case omits much of the relevant proceedings below and is inaccurate in numerous respects, particularly as it relates to (1) the interests in the Washington Properties (as defined herein), and (2) certain provisions of the Plan.

(1) Pursuant to a Hypothecation and Security Agreement dated May 14, 1981, by and between Gould, MCLP, and the Bank, as amended, Gould hypothecated to MCLP, and MCLP, as security for all present and future obligations to the Bank in connection with the Miami Center

Project, pledged to the Bank, *inter alia*, all right title and interest of Gould (or any entity in which Gould has or obtains an interest) to distributions, as a general and/or limited partner from 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, and Eleven Dupont Circle Associates. These entities owned interests in real estate located in the Washington, D.C. area (the "Washington Properties"). A copy of the Hypothecation and Security Agreement dated May 14, 1981 and all amendments and modifications became part of the record as Exhibit "A" to the Bank's cash collateral motion. [App. C-20].

Pursuant to an Assignment and Security Agreement dated October 14, 1983, Gould created in favor of the Bank as security for all of Gould's obligations to the Bank, *inter alia*, a security interest in all of the "collateral" described in the Hypothecation and Security Agreement, dated May 14, 1981 as amended. A copy of the Assignment and Security Agreement dated October 14, 1983, became part of the record as Exhibit "D" to the Bank's cash collateral motion. [App. C-65].

Pursuant to an Assignment and Security Agreement, dated June 23, 1983, as amended, Holywell, as collateral security for Holywell's obligations in connection with the Bank loans, assigned to the Bank and granted the Bank a first priority security interest in, *inter alia*, (i) all right, title and interest of Holywell (including, without limitation, any interest obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all monies due and/or to become due to Holywell as a general or limited partner of 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Eleven Dupont Circle Associates, and Dupont Land Associates; (ii) all right, title and interest of Holywell in and to 10 shares, constituting all of the issued and outstanding capital stock of Twin and all the stock of certain other Holywell subsidiaries. A copy of

the Assignment and Security Agreement dated June 23, 1983 and all amendments became part of the record as Exhibits "B" and "C" to the Bank's cash collateral motion. [App. C-41 and C-63].

By virtue of the Debtors' default under the loan documents, including the stock pledge, the Bank had the right to exercise all rights of ownership that Holywell held over the Twin stock and assets, including the proceeds of the sale of the Washington Properties (the "Washington Proceeds"). [App. D-22-26].

On October 1, 1984, Gould and Holywell admitted their ability to control Twin by seeking Bankruptcy Court approval to sell the Washington Properties. [App. E]. Because Twin was an asset of Holywell and subject to the security interest of the Bank and subject to the jurisdiction of the Bankruptcy Court pursuant to Section 541(a) of the Bankruptcy Code, Holywell and Gould sought Bankruptcy Court approval to dispose of Twin's sole asset—its interest in the Washington Properties.

In their motion seeking approval of this sale, the Petitioners represented to the Bankruptcy Court and to hundreds of creditors, including the Bank:

Consummation of the transaction proposed herein is in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale *which inures to Holywell and Gould* will provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings.

(Emphasis added). [App. E-3]. Thus, contrary to Petitioners' statement (Petition, page 4), Holywell and Gould represented and admitted that they would control or use Twin's share

of the net proceeds of sale, ultimately \$13.1 million (the "Twin Cash"). The Twin Cash was part of the net sales proceeds—approximately \$32 million in net proceeds.

The Bankruptcy Court approved the sale, with the proviso that the proceeds of the sale would be segregated and held, "subject to further Order of this Court." [17-20a]. Neither the Petitioners nor Twin appealed that order.

Thereafter, the Bankruptcy Court granted the *Bank's* motions:

(a) requiring the Petitioners to deposit the sales proceeds (including the Twin Cash) into separate accounts subject to further order of the Bankruptcy Court [17-20a; App. B-1]; and

(b) declaring that all such proceeds constituted "cash collateral" of the Bank (the "Cash Collateral Order"). [21-24a; App. C-1].

Petitioners suggest that these orders distinguish between the proceeds due Holywell and Gould from the proceeds due Twin. (Petition, pages 4-5). The Bankruptcy Court made no such distinction. Neither the Petitioners nor Twin appealed those Orders.

The Debtors filed Schedules and Statements of Affairs listing their respective assets and liabilities. They disclosed that Twin functioned solely as a holding company for Holywell, its sole asset was its interest in the Washington Properties and Twin had no liabilities. The absence of any liabilities on the part of Twin is shown by the Petitioners' scheduling Twin's value as the exact amount of Twin's share of the Washington Proceeds. [App. P].

In its disclosure statement, Holywell represented to the Bankruptcy Court and the creditors that all of the

Washington Proceeds, including the Twin Cash, would be used to pay the claims of creditors. [App. F-6].

Under the Bank's Plan, the Bank's cash collateral, including the Twin Cash by virtue of the Cash Collateral Order were to be used to pay the claims of hundreds of creditors. Although the Debtors and various related entities filed objections to the Bank's Plan, neither Twin nor the Petitioners filed any objection to the use of Twin Cash. Twin did not take an appeal from the Confirmation Order.

The Bankruptcy Court's Orders required both the Debtors and the Bank to file certificates as to the voting by creditors and the source of cash to fund their respective plans. On May 13, 1985, Petitioners certified that \$14,738,000 was available to fund the Debtors' proposed plans, including the Twin Cash. [App. I]. In so certifying, the Debtors again evidenced their complete control over the Twin Cash and admitted that such funds would be used under any plan of reorganization to pay creditors.

The Debtors failed to obtain a stay pending review of the Confirmation Order. On October 10, 1985, implementation of the Plan began. The liquidating trustee appointed pursuant to the terms of the Confirmed Plan (the "Liquidating Trustee"), marshalled all of the Bank's cash collateral that had been realized as part of the sale of the Washington Properties [App. G-11, 23, and 30], and used those funds to pay creditors. In addition, Holywell's property within the meaning of section 541(a) of the Bankruptcy Code, including Holywell's interest in Twin, became part of the Miami Center Liquidating Trust (the "Liquidating Trust").

After substantial consummation of the Plan, Gould, despite lacking any interest in Twin, filed a motion in the Bankruptcy Court to claim, for the first time, that the Twin Cash could not be used to pay creditors under the Plan. The

Liquidating Trustee, who owned all of the stock of Twin, opposed that claim and never authorized the Petitioners to assert any claim against the assets of Twin. [App. D].

The Bankruptcy Court and the District Court both concluded that Twin had transferred the Twin Cash to Holywell and Gould, that the Twin Cash was an asset of Holywell under Section 541(a) of the Bankruptcy Code, and that only the Liquidating Trustee could disburse those funds. [15a].

Prior to the confirmation, Twin had never appeared separately before the Bankruptcy Court. Its president and director was Gould, and Holywell owned 100% of Twin. As a holding company for Holywell, any asset of Twin was subject to the total control and disposition by Holywell and Gould. The Bank held security interests in Twin and in Twin's interest in the Washington Proceeds. Upon filing their petitions in bankruptcy, the assets of Holywell and Gould, which included the Twin stock and any interest in the Washington Properties, became subject to the control and jurisdiction of the Bankruptcy Court. The Plan specifically addressed the use of the Twin Cash and the other assets of the Debtors for payment of the claims of creditors.

(2) The Petitioners' description of the Plan's provisions is inaccurate in the following respects:

(a) In describing the Plan's provisions for dismissal of the Debtors' civil action against the Bank, Petitioners omitted reference to a judicial determination that releases signed by the Debtors in 1983 and 1984 barred those claims. *In re Holywell Corp.*, 49 Bankr. 694 (S.D. Fla. 1985). (Petition, page 8).

(b) The Plan provided for the sale of the Miami Center Project with interest on the mortgage debt computed at the

pre-default rate rather than at the substantially higher default rate.⁴

(c) The Plan did not provide for the "[t]aking of chattels which were not the property of the Debtors' estates, owned by non-filed solvent affiliated creditors." (Petition, page 8). The Bankruptcy Court, the District Court, and the Eleventh Circuit have all determined that the Plan provided for the purchase of chattels. The Trustee sold those chattels to the Bank as part of the Plan's purchase price.

(d) There has never been any judicial determination that the Bank subordinated insider claims totalling "\$26,123,498" (Petition, page 8), nor is there any basis for that allegation in the record below.

(e) The Plan dealt with the "super-priority loans" and the tax claims. The super-priority loans (which were, in fact, inter-debtor loans) were dealt with in Article II of the Plan.⁵ Tax claims were dealt with in Article III of the Plan.⁶ There is no record support for the Petitioners' bald allegation that unpaid income taxes are \$20,763,841. (Petition, page 9). At the time of confirmation of the Plan, there were no pending tax claims that the Plan did not cover. The Petitioners failed to disclose or deal with any such claims in their plans filed in 1985.

In footnote 4 on page 10 of the Petition, the Petitioners imply that in a separate appeal brought by the "Miami Center Joint Venture" and its partners, the District Court

⁴On page 8 of the Petition, the terms "accrued unmatured interest" is inaccurate. The interest credit taken at closing pursuant to the Plan represented fully accrued and matured interest to the closing date.

⁵[App. H-10].

⁶[App. H-10].

reversed *in toto* the Confirmation Order. The reversal and remand was directed to *only one claim* for which contingency the Plan had specifically provided. That claim was given a special mechanism for payment. [App. J-15-16]. The balance of the Plan and Confirmation Order remain intact.

ARGUMENTS AGAINST GRANTING THE WRIT

The Eleventh Circuit, in rejecting the Petitioners' appeal of the District Court's order affirming the Bankruptcy Court's decision that the Liquidating Trustee was the only party entitled to the use of the Twin Cash held as follows:

The district court found that appellants were equitably estopped with respect to their claim to the proceeds of Twin Development Corporation's assets. We find no error in the district court's analysis, and the record abundantly supports the district court's findings. Appellants other claims on appeal are frivolous.

I.

Lack of Jurisdiction

A.

Petitioners Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction

The Petitioners have failed to establish any of the considerations governing review on certiorari as set forth in Rule 17 of the Supreme Court Rules. These considerations, "while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered." Sup. Ct. R. 17.1. The failure to point to any

conflict or any important question of federal law weighs heavily against jurisdiction in this matter.

B.

The Petition Is Moot

This Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan has been substantially consummated.⁷ *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Sewanee Land, and Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). "In this situation, the mootness doctrine promotes an important policy of bankruptcy law—that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the implementation of a confirmed plan forever changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

Accordingly, the Eleventh Circuit dismissed the Debtors' appeal from the Confirmation Order as moot, ruling that the Plan has been substantially consummated and that it would be "legally and practically impossible to unwind the confirmation of the plan or otherwise to restore the status quo." *Miami Center Ltd Partnership v. Bank of New York*,

⁷Currently pending before this Court, in Case No. 87-1988, is the Debtors' (including these Petitioners) Petition for Writ of Certiorari. In that Petition and the Bank's Brief in Opposition, the issue of mootness is fully examined. The analysis there is equally applicable here and dictates the denial of the Petitioners' instant Petition as moot.

838 F.2d 1547, 1554 (11th Cir. 1988). Likewise, this Court should deny this Petition as moot.

C.

Petitioners Lack Standing

Pursuant to the specific terms and conditions of the Plan, all of Holywell's property within the meaning of Section 541(a) of the Bankruptcy Code, including all interests of Holywell in Twin, vested in the Liquidating Trust. Prior to confirmation, Twin did not take appropriate steps to protect its appellate rights; it left that task to its debtor/parents, Gould and Holywell, who have never taken any appeal on behalf of Twin.

In order to have proper standing to pursue an appeal, a party must have an interest which is directly and adversely affected by the order which is being appealed. *R.T. Vanderbilt Co. v. OSHA Review Comm'n*, 708 F.2d 570, 574 (11th Cir. 1983); *In re Fondiller*, 707 F.2d 441, 442-43 (9th Cir. 1983); *In re Goodwin's Discount Furniture, Inc.*, 16 Bankr. 885, 887-89 (B.A.P. 1st Cir. 1982); *In re Johns-Manville Corp.*, 68 Bankr. 618, 623-24 (S.D.N.Y. 1986); *In re Evans Prods. Co.*, 65 Bankr. 870, 874 (S.D. Fla. 1986); *In re Sweetwater*, 57 Bankr. 743, 746 (D. Utah 1985).

In this case the "order appealed from" is the order of the Bankruptcy Court on Gould's Emergency Motion for Clarification. That order held that pursuant to the Plan, the Liquidating Trustee was authorized to use the Twin Cash to pay creditors of the estate. All of the Washington Proceeds, as well as all the Section 541(a) assets of the Debtors vested in the Liquidating Trustee on October 10, 1985. Holywell and Gould have failed in their attempt to reverse the Confirmation Order. Thus, because the Confirmation Order

and Plan extinguished Holywell and Gould's interests in the Twin Cash, they do not have standing to pursue this Petition.

II.

The Lower Courts Correctly Applied The Substantive Consolidation And Equitable Estoppel Doctrines

The Petitioners, in an attempt to fabricate or create the appearance of a conflict among the various circuits, have erroneously asserted that the primary issue in this case is the improper exercise of jurisdiction by the Bankruptcy Court over the asset of a non-debtor. This argument is factually and legally wrong and ignores the true issue, i.e., the conduct of Twin, Holywell and Gould that led the District Court to rule that substantive consolidation of non-debtor assets had not occurred and that the Petitioners were estopped from contesting the use of the Twin Cash.

A.

Substantive Consolidation

In essence, the Petitioners argue that the Bankruptcy Court in effect sanctioned the substantive consolidation of Twin with the Debtors. The Petitioners have turned a blind eye to the record below. The distinct and separate corporate identity of Twin is a non-issue in light of the actions of Twin, Holywell and Gould in transferring the Twin Cash into the Debtors' estates.

The Bankruptcy Court's order on Gould's Emergency Motion for Clarification which gave rise to this Petition certainly did not provide for the consolidation of Twin with the Debtors; it simply rejected the Petitioners' argument that the Liquidating Trustee could not use the Twin Cash to pay

creditors. The Liquidating Trustee's confirmed right to use the funds is specifically set forth in the Plan.

The Bank's Plan *did not* substantively consolidate the assets of Twin with those of the Debtors. Substantive consolidation occurs pursuant to Section 105 of the Bankruptcy Code, and as to Twin, consolidation, never occurred here. 5 *Collier on Bankruptcy* ¶1100.06[1] at 1100-32 (15th Ed. 1985). The Plan authorized the Liquidating Trustee to use the Twin Cash to pay creditors, based upon two facts: (a) the Twin Cash became available to pay creditors, just as Gould and Holywell represented it would and as they had represented by their conduct; and (b) the Liquidating Trustee became the owner of all of Holywell's interests in Twin pursuant to the terms of the Plan. With that ownership came the right to use the Twin Cash in accordance with the Plan.⁴

As indicated above, Gould and Holywell transferred the Twin Cash into their estates to give them liquidity and to induce creditors to vote for their proposed plans (which, like the Bank's Plan, provided for the use of the Twin Cash to pay creditors). Consequently, the Petitioners' argument of procedural and substantive due process violations (Petition, page 18), lacks substance.

B.

Equitable Estoppel

The facts supporting the District Court's invocation of equitable estoppel were in the record before the District Court below and were thoroughly briefed by the Bank in its Answer Brief. [App. K]. The record before the District Court amply supported the District Court's conclusion that the three

⁴With that ownership also came the right to direct any litigation on behalf of Twin. The Petitioners are now pursuing a claim against the Twin Cash without any authorization by Twin itself.

elements of equitable estoppel, as correctly set forth in the District Court's opinion, were present.⁹

The Petitioners argue that the representations made in the Emergency Motion For Clarification (Petition, pages 25-26) referred to funds of Holywell and Gould that were separate from the proceeds to be received by Twin. Such a position is contradicted by the very language of the motion, in which the Petitioners sought:

an order authorizing and approving the *sale by Holywell and Gould of certain real and personal property owned by Holywell and Gould* as partners and stockholders in Twin (and non-debtor partnerships).

(Emphasis added). [App. E].

The Petitioners' argument, that the reference to "cash infusion" was limited to any distribution due Gould and Holywell from the partnerships and did not include the Twin Cash, is also without merit. No such distinction was ever made by the Petitioners prior to the Emergency Motion for Clarification. Further, in light of the subsequent orders of the Bankruptcy Court to segregate *all* funds from the sale of the Washington Properties, including any part otherwise allocable to Twin, neither the Bankruptcy Court, the creditors, nor the Debtors recognized such a distinction. These orders were never appealed.

⁹The elements of equitable estoppel are:

- (1) words, acts, conduct, or acquiescence causing another to believe in the existence of a certain state of things;
- (2) willfulness or negligence with regard to the acts, conduct, or acquiescence; and
- (3) detrimental reliance by the other party upon the state of things so indicated.

In re Garfinkle, 672 F.2d 1340, 1347 (11th Cir. 1982).

It must be noted that after the sale, all corporate activity of Twin ceased. Twin's only asset, its interest in the Washington Properties, had been sold. The cash proceeds from that sale were readily available to Twin's sole shareholder, Holywell, and had been pledged to the Bank pursuant to the above-described security agreements. The District Court's interpretation of the Debtors' statement—that this cash was to be available to creditors—is consistent with basic principles of bankruptcy law. It is contrary to basic principles of bankruptcy law that an asset of Holywell, worth over \$13 million dollars, would remain outside the reach of creditors of the estate of Holywell, particularly when Gould and Holywell voluntarily transferred the Twin Cash to Holywell's estate and thus submitted it to the jurisdiction of the Bankruptcy Court.

The Petitioners' argument (Petition, page 26) that the use of the funds was limited to the Debtors' proposed plans is also meritless. At the time of the sales, the Debtors had not submitted a disclosure statement or plan of reorganization. As is evident from the orders regarding the sale of the Washington Properties, the Bankruptcy Court recognized that *all* of the Washington Proceeds, including the Twin Cash, were the cash collateral of the Bank [21a], and that those funds were not subject to discretionary use by the Debtors.

Early in the bankruptcy proceedings, the Petitioners filed Schedules and Statements of Affairs listing their respective assets and liabilities. In Holywell's Schedules, Holywell admitted its *100% control over Twin* and the *absence of any liabilities* on the part of Twin by scheduling Twin's value as \$13,210,000, coincidentally the exact amount of the proceeds due Twin from the sale of the Washington Proceeds. [App. P].

The Debtors submitted five nearly-identical disclosure statements and proposed plans of reorganization. The

Holywell disclosure statement represented that all of the sale proceeds of the Washington Properties, including any proceeds otherwise allocable to Twin, would be available to pay creditor claims. [App. F-6].

On May 13, 1985, Petitioners' counsel of record certified that \$14,738,000 was available to fund the Debtors' proposed plans, including funds in the "Twin Development Trust Account" at Florida National Bank. [App. I].

The District Court also relied upon statements made by Gould under oath [App. L] in response to questions concerning the use of the Washington Proceeds received by Twin:

Q. Twin Development Corporation?

A. It's a wholly-owned subsidiary of Holywell.

Q. What does it do?

A. It owned the general partnership in 1300 North 17th Street.

Q. That had something to do with the Washington property?

A. It is one of the buildings in the Washington area.

Q. If one of those subsidiaries had some money coming out of that closing, that would have gone to Holywell?

A. *It has to go to Holywell as dividends.*

(Emphasis added).

The Petitioners argue that such testimony does not support the District Court's findings. That testimony, however, was given during a Bankruptcy Rule 2004 Examination *just after the sale of the Washington Properties*. When viewed in the proper context—i.e., as part of an examination concerning the assets available to the Debtors from the sale of the Washington Properties—the District Court properly concluded that the testimony provided further evidence that any funds derived by Twin from the Washington Properties were part of the Debtors' estates.

The District Court also cited examples of the Petitioners' misrepresentation by their acquiescence. [10-11a]. The District Court pointed to the absence of any appeals by Gould or Holywell of the orders of the Bankruptcy Court approving the sale of the Washington Properties, directing the proceeds to be placed in segregated accounts, and treating the proceeds as cash collateral of the Bank.

The Petitioners have also taken the position (Petition, pages 27-28) that the Bank's lien over the funds has never been conclusively decided. This too is inaccurate. In the Cash Collateral Order treating the Washington Proceeds as cash collateral of the Bank, the Court stated:

The net proceeds of the Washington sale constitute cash collateral as defined in § 363 of the Bankruptcy Code.

The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of \$264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank

of New York in subsequent appropriate proceedings.

(Emphasis added). [23a]. However, neither Gould, Holywell nor Twin ever appealed this order or contested the lien.

The Plan clearly stated that all of the Washington Proceeds would become part of the Liquidating Trust to be distributed to creditors by the Liquidating Trustee. [App. G-11, 14-15, 23, and 29-30]. The Bank's disclosure statement listed the exact amount of the Washington Proceeds, \$32,422,798.37, which included the funds *transferred* by Twin to the Debtors. [App. G-11 and 14-15]. In the Plan, the Bank specifically stated: "The Bankruptcy Court has determined that the Washington Proceeds are BNY's cash collateral." [App. G-15].

The District Court reviewed Holywell's disclosure statement, the Debtors' proposed plans of reorganization, Gould and Holywell's statements that the sale of the Washington Properties would be beneficial to the creditors, and Gould's deposition testimony, and found evidence of willful representations that the funds would be under the control of the Debtors and subject to disposition by orders of the Bankruptcy Court. The District Court found that the Bank relied to its detriment on those representations. In addition, the District Court concluded that Gould and Holywell's failure to object and specifically contest the use of the Twin Cash under the Confirmation Order and other orders of the Bankruptcy Court regarding the Twin Cash evidenced improper conduct. The District Court concluded that, "by concealing from the Bank their true intention to thwart such a use of the proceeds if at all legally possible, the appellants evidenced the requisite intent under equitable estoppel." [12a].

Even in the Petitioners' initial appeal from the Confirmation Order, in which no objection to the use of Twin Cash was made, the Petitioners admitted to having equity participations in the limited partnerships that owned the Washington Properties and that they realized approximately \$32 million from the sale of these properties.

Petitioners challenge the District Court's conclusion that they acquiesced in the use of the Twin Cash under the terms of the Plan. (Petition, pages 27-29). The clear language of the Plan (served in early 1985) clearly provided for the use of the Washington Proceeds, which by definition included the Twin Cash:

Upon the passing of title of Miami Center to BNY, BNY's liens and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY Holywell Loan and the *balance of the Washington Proceeds will be available for distribution to the creditors.*

(Emphasis added). [App. G-23]. In their primary appeal of the Confirmation Order, the Debtors (including the Petitioners herein) *never* challenged the use of the Twin Cash.

Further, neither Holywell, Gould nor Twin took an appeal from the Bankruptcy Court order approving the Liquidating Trustee's First Report filed on November 22, 1985. [App. N]. In the Report, the Liquidating Trustee clearly listed the Twin Cash as an asset subject to disposition by the Trustee.

Additionally, on December 30, 1985, the District Court remanded the Debtors' appeal from the Confirmation Order back to the Bankruptcy Court for the entry of more detailed findings of fact and conclusions of law. [App. M]. The Petitioners never took issue with the Plan's use of the Twin Cash despite the District Court's direction to raise any such

issue during the proceedings on remand. In the Bankruptcy Court's findings of fact and conclusions of law after remand [App. O], the District Court concluded that the Washington Proceeds (including the Twin Cash) were part of the Bank's cash collateral to be used to pay creditors. The District Court then affirmed the Bankruptcy Court's findings of fact and conclusions of law specifically noting that the Plan used "the proceeds of the sale by the Debtors of certain realty owned by them in Washington, D.C. (\$32,000,000)." *Holywell Corp. v. Bank of New York*, 59 Bankr. 340, 345 (S.D. Fla. 1986). In their appeal to the Eleventh Circuit, which was dismissed as moot,¹⁰ the Petitioners did not dispute that determination by the District Court.

The Bank detrimentally relied upon the Petitioners' representations and conduct as to the use of the funds. The District Court concluded that as a result of the Debtors' representations and conduct, the Bank did not object to the sale of the Washington Properties, and allowed a substantial portion of the Washington Proceeds to be distributed to the creditors pursuant to the Plan. [13-14a].

The decision of the Bankruptcy Court, the District Court, and the Eleventh Circuit Court of Appeals did not sanction the "improper use" of the assets of a non-debtor, or the "illegal substantive consolidation" of the assets of a non-debtor with a debtor. The Bankruptcy Court ruled in response to Gould's Emergency Motion for Clarification that the Liquidating Trustee was the only party that had control of the Twin Cash pursuant to the Plan. The orders of the Bankruptcy Court prior to confirmation and the provisions of the Plan clearly justified that holding. The District Court held that the Petitioners were "equitably estopped" from contesting the use of the Twin Cash. The record on appeal before the District Court justified this holding. The Eleventh

¹⁰*Miami Center*, 838 F.2d 1547.

Circuit ruled that the record before the District Court clearly supported the District Court's finding on the issue of equitable estoppel and that the Petitioners' other legal arguments were "frivolous."

The cases cited by the Petitioners in their Petition are inapposite. The Petitioners cite a line of cases to support a general legal principle that the assets of non-filed affiliated corporations cannot be used to satisfy the debt or claims against a debtor. The Bank does not dispute the validity of that principle. However, this is not the issue in this case. The issue in this case is whether the interrelationships of the Petitioners and Twin along with their actions in dealing with the Twin Cash and other actions by the Petitioners as set forth above made the Twin Cash available to pay the claims of creditors of Holywell pursuant to the Plan. The Bankruptcy Court and the District Court found that to be the case. The Court of Appeals affirmed.

The Petitioners also argue that *In re Texas Consumer Finance Corp.*, 480 F.2d 1261 (5th Cir. 1973) is analogous to the factual and procedural pattern of this case and should be dispositive. The Petitioners totally distort the holding of *Texas Consumer*. They fail to mention that in that pre-Code Chapter XI case, the Bankruptcy Court was statutorily without jurisdiction to affect the rights of existing shareholders. Prior to the enactment of the Bankruptcy Code, the rights of shareholders could only be affected under a plan in the context of a Chapter X proceeding. This distinction between Chapter X and Chapter XI with respect to altering the rights of shareholders has been abolished under the Bankruptcy Code and the holding in *Texas Consumer* is no longer viable.

The Petitioners, in their factual and legal analysis seek to confuse this Court. First, they raise a fictitious legal issue, i.e. the improper exercise of jurisdiction by the Bankruptcy

Court over the assets of a non-debtor, and, second, they erroneously assert that the decision of the Eleventh Circuit condoned such actions thus creating a conflict with other circuits with respect to this fictitious issue. This Court should ignore the Petitioners' attempted slight of hand. There is nothing complicated or unusual about the true issues decided by the Bankruptcy Court, the District Court, or the Eleventh Circuit Court of Appeals.

The Bankruptcy Court did not improperly authorize the seizure of the assets of a non-debtor or improperly substantively consolidate the assets of a non-debtor. The Bankruptcy Court made a fact-based finding that the Twin Cash was subject to the control of the Liquidating Trustee because it was an asset of Holywell specifically earmarked to pay the claims of creditors and passed to the Liquidating Trustee under the Plan. The District Court agreed with the Bankruptcy Court's conclusion and ruled that the record before it on appeal established that the Petitioners were estopped from contesting the Bankruptcy Court's decision. The Eleventh Circuit ruled that the record before the District Court abundantly supported its finding of equitable estoppel.

III.

The Ruling Of the Eleventh Circuit Does Not Sanction The Violation Of Certain Rules Of The Federal Rules Of Civil Procedure And Does Not Create A Conflict Among The Circuits

The Petitioners argue that the Eleventh Circuit's ruling sanctions the violation of Rule 8(c) of the Federal Rules of Civil Procedure which requires that an affirmative defense be asserted in a responsive pleading and of Rule 52(a) of the Federal Rules of Civil Procedure which requires that a trial court make specific findings of fact. These arguments are misguided because the action was initiated as a motion and

not as an adversary proceeding. Bankruptcy Rule 9014, which governs motions, limits the applications of both Rules 8(c) and 52(a).

The Petitioners contend that a conflict between the Eleventh Circuit and the other circuits exists regarding the District Court's *sua sponte* consideration of equitable estoppel. The Petitioners cite *In re Golden Plan of California, Inc.*, 829 F.2d 705 (9th Cir. 1986) and *In re Prestige Spring Corp.*, 628 F.2d 840 (4th Cir. 1980) in support of their argument that the Eleventh Circuit's *sua sponte* consideration of equitable estoppel is inconsistent with the Fourth and Ninth Circuits. An examination of these cases and the case at bar clearly demonstrates that the Petitioners have again created a non-issue and that no conflict exists requiring resolution by this Court.

A.

Rule 52(a)

The Eleventh Circuit's ruling did not violate Rule 52(a). Under Rule 52(a) and Bankruptcy Rules 9014 and 7052, specific findings of fact are not required or necessary in this case. On January 22, 1986, Gould filed an Emergency Motion for Clarification to clarify the right of the Liquidating Trustee to use the Twin Cash to pay creditors. Having brought a motion, as opposed to initiating an adversary proceeding, Bankruptcy Rule 9014 governed the Emergency Motion for Clarification. Bankruptcy Rule 9014 makes Bankruptcy 7052 applicable to contested matters, which, in turn, incorporates Rule 52. The last sentence of Rule 52(a) specifically states: "Findings of fact and conclusions of law *are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).*" (Emphasis added).

The Emergency Motion for Clarification was not a motion under Rule 41(b), and therefore, the Bankruptcy Court was not required to issue any findings of fact. The content of the last sentence of Rule 52(a) is applicable to motions filed in bankruptcy cases. See *In re Campfire Shop, Inc.*, 71 Bankr. 521, 524, 525 (E.D. Pa. 1987); *In re Shariyf*, 68 Bankr. 604, 608 (E.D. Pa. 1986). Thus, the Bankruptcy Court did not have to issue findings of fact on the Emergency Motion for Clarification based upon the specific language of Rule 52(a).

Furthermore, the Petitioners cannot claim that the District Court erred in issuing a decision without receiving evidence or hearing testimony. In this case, the District Court was not a court of original jurisdiction, but, pursuant to 28 U.S.C. 158, was the initial court of review of the decision of the Bankruptcy Court. The District Court was not the proper forum to hold an evidentiary hearing on this issue. As the Eleventh Circuit properly noted, there was sufficient documentation presented to the District Court on appeal to support the District Court's findings that the Petitioners were equitably estopped from contesting the use of the Twin Cash by the Liquidating Trustee.

B.

Rule 8(c)

The Petitioners' claim that the District Court exceeded its authority by making the *sua sponte* decision to invoke the doctrine of equitable estoppel. Petitioners claim that this is a violation of Rule 8(c) of the Federal Rules of Civil Procedure because estoppel is an affirmative defense which must be pleaded and proved in the court of original jurisdiction.

Petitioners' reliance upon Rule 8(c) is misguided in this case. Rule 8(c) applies only to actions instituted in the District Court or *adversary proceedings* instituted in the Bankruptcy

Court pursuant to Bankruptcy Rule 7008. *In re Farmers' Co-op of Arkansas and Oklahoma, Inc.*, 43 Bankr. 619 (W.D. Ark. 1984). This argument fails to recognize that Gould filed a motion governed by Bankruptcy Rule 9014 and did not initiate an adversary proceeding. As such, Bankruptcy Rule 9014 governs the motion. Bankruptcy Rule 9014 provides in material part: "No response is required under this rule unless the court orders an answer to a motion."

Bankruptcy Rule 9014 incorporates a number of rules relating to adversary proceedings, but not Rules 7008 or 7012, which would have required the responsive pleading of an affirmative defense. This specific exclusion is in recognition that Rule 9014 does not require a formal response unless the court orders an answer to the motion. The Bankruptcy Court did not order the Liquidating Trustee or the Bank to respond to the motion. Because there was no requirement to file a responsive pleading to the motion, the failure of the Bank or the Liquidating Trustee to raise equitable estoppel in a responsive pleading cannot act as a bar to the District Court's review and consideration of that basic legal principle.

The cases cited by the Petitioners—*Golden Plan* and *Prestige Spring*—were concerned with *adversary proceedings*, and therefore are not applicable. Furthermore, these cases involved fraudulent conveyances which are specifically governed by the procedures of Bankruptcy Rule 7001 which requires the initiation of *adversary proceedings*. Adversary proceedings, in turn, are subject to the pleading requirements of Bankruptcy Rule 7008. Bankruptcy Rule 7008, which incorporates Rule 8, is *not* incorporated into Bankruptcy Rule 9014 and therefore is not applicable to motion practice. Because no response was required to the Emergency Motion for Clarification, Petitioners cannot argue that the failure to raise the defense of equitable estoppel in the Bankruptcy Court is a bar to its consideration by the District Court.

CONCLUSION

Based on the foregoing reasons and authorities, this Court should deny the Petition.

Respectfully submitted,

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①

Supreme Court, U.S.
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CLERK

NO. 88-80

in the
Supreme Court
of the
United States

OCTOBER TERM, 1988

HOLYWELL CORPORATION and
THEODORE B. GOULD,

Petitioners

vs.

FRED STANTON SMITH, Trustee of the
Miami Center Liquidating Trust, and
THE BANK OF NEW YORK,

Respondents

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS FOR REVIEW

1. Whether the Petition for Writ of Certiorari is moot in light of the opinion of the United States Court of Appeals for the Eleventh Circuit in *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), which held the plan of reorganization is substantially consummated and no effective relief is available to the parties?

2. Whether the petitioners have standing to maintain this appeal on behalf of Twin Development Corporation?

3. Whether the Court of Appeals for the Eleventh Circuit and the United States District Court correctly applied the doctrine of equitable estoppel?

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STATEMENT OF THE CASE

Petitioners Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould") are two of five debtors¹ who filed voluntary petitions under Chapter 11 in August, 1984. The filing of these bankruptcy petitions followed the institution of foreclosure actions by Respondent Bank of New York ("bank") after the debtors defaulted on their obligations to the bank. The bank had financed construction of the "Miami Center Project," a hotel and office complex in Miami with a parking garage and shopping arcade (a5).²

Petitioner Gould is the sole shareholder and president of Petitioner Holywell, which in turn is the sole shareholder of Twin Development Corporation ("Twin"). In addition, Gould is the president, director and sole agent of Twin (a6; A 1).

On June 23, 1983, Holywell pledged, *inter alia*, Twin's stock to the bank to secure Holywell's guaranty of the bank's construction loans to Holywell. Upon the debtors' default of their obligations to the bank and the resulting bankruptcy, Twin's stock became the "unfettered" property of the bank under the terms of the agreement between the bank and Holywell (a6).

Prior to the bankruptcy of its sole stockholder and its president, Twin had entered into a contract to sell real and

¹Debtors Miami Center Corporation, a wholly owned subsidiary of Holywell, Chopin Associates, a partnership in which Gould and Miami Center Corporation are the sole general partners, and Miami Center Limited Partnership, a limited partnership in which Gould and Miami Center Corporation are the general partners, did not appeal the bankruptcy court's order which is the subject of this appeal.

²Petitioners' appendix will be referred to as (a____). Respondent liquidating trustee's appendix will be referred to as (A____).

personal property owned by Twin and four limited partnerships, all controlled by petitioners Gould and Holywell (a6; a25). On October 22, 1984, the bankruptcy court entered an order upon motion of Holywell and Gould authorizing and approving the sale of this property, known as the Washington properties (a25). The bankruptcy court ordered Holywell and Gould to consummate the sale and to segregate the net proceeds due Holywell and Gould until further court order (a26). Gould testified during the course of the bankruptcy proceedings that Twin's share of the sale proceeds "has to go to Holywell as dividends" (a 10). In Gould and Holywell's motion filed in the bankruptcy court to authorize and approve the sale of Twin's Washington properties, the petitioners represented that

Consummation of the transaction proposed herein is in the best interest of creditors in these proceedings in that immediate cash infusion from such sale which inures to Holywell and Gould will provide the *Debtors* with capital much needed as an essential part of the reorganization sought in these proceedings (emphasis added) (A 4).

Following the sale of the Washington properties, the bankruptcy court ordered Gould and Holywell to cause the net proceeds received by Twin, Holywell and Gould from the sale to be deposited into a segregated account, subject to further court order (a17-19). Neither the petitioners nor Twin appealed. In fact, Holywell and Gould deposited all funds received as sale proceeds.

Thereafter, the bankruptcy court entered a cash collateral order whereby all of the funds deposited by the petitioners and Twin were deemed cash collateral of the bank (A 6). Again, neither the petitioners nor Twin, which the petitioners entirely controlled, appealed that order.

Subsequently, the bank and the five debtors submitted proposed plans of reorganization. The bank's plan was funded in part by this cash collateral—the entirety of the proceeds from the sale of the Washington properties (a6-7). That aspect of the plan was revealed in the bank's disclosure statement (A 14).

The Holywell disclosure statement made it clear to the bankruptcy court and all creditors that the cash proceeds derived from the sale of the Washington properties accruing to Twin would be available to pay creditors (A 10-13; a10). The petitioners also filed certificates with the bankruptcy court regarding their plans of reorganization in which the petitioners stated the funds due Twin from the sale would be used to pay creditors (a10).

The creditors overwhelmingly approved the bank's plan, and the bankruptcy court confirmed the bank's Amended Consolidated Plan of Reorganization, which expressly included the entire proceeds from the sale of the Washington properties. The United States District Court for the Southern District of Florida affirmed the order of confirmation, as amended after remand, and the United States Court of Appeals for the Eleventh Circuit dismissed the five debtors' appeal as moot because no stay was in effect,³ the plan was substantially consummated and the court could not grant meaningful relief. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). In June, 1988, the five debtors filed petitions for writs of certiorari and mandamus in this Court, case numbers 87-1988 and 87-1989, directed to the Eleventh Circuit and the bankruptcy

³The bankruptcy court ordered a stay of the implementation of the plan upon the posting of a \$140 million bond. There were over 400 creditors and claims of approximately \$350 million. Although the district court reduced the bond to \$50 million, effective for ninety days, the debtors did not post a bond and the plan became effective on October 10, 1985.

court. Respondent Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust ("liquidating trustee"), and the bank have filed briefs in opposition to those petitions, and the matters pend before the Court. Twin never objected to the bank's plan and never appealed the order of confirmation.

The plan provided for the substantive consolidation of the debtors and the creation of the Miami Center Liquidating Trust, which was funded by all of the debtors' 11 U.S.C. Section 541(a) defined assets (A 17), and by the Washington proceeds, including the sums due Twin from that sale.

Several months after the plan was confirmed and implemented, and with no stay in effect, Gould filed an emergency motion with the bankruptcy court for clarification regarding the ownership and control of two United States Treasury Bills held in the name of Twin, account no. 0002842207 at Florida National Bank of Miami, and having a par value of \$13,949,000. The bankruptcy court entered an order in which it determined that the liquidating trustee was the sole party entitled both to direct Florida National Bank of Miami to cash the treasury bills at issue, and to distribute the funds in accordance with the terms of the confirmed plan (a15-16). Gould and Holywell appealed that order. Twin did not. The district court affirmed (see opinion at a5), as did the Eleventh Circuit (see opinion at a3), which also denied Gould and Holywell's petitions for rehearing and rehearing *en banc* (see opinion at a1). The Eleventh Circuit, in affirming the district court, held:

The district court found that appellants were equitably estopped with respect to their claim to the proceeds of Twin Development Corporation's assets. We find no error in the district court's analysis, and the record abundantly supports the district court's findings. Appellants' other claims on appeal are frivolous (a3).

Twin never appealed the bankruptcy court's order regarding the proceeds from the sale of the Washington properties held at the Florida National Bank of Miami, nor did it seek to intervene in the appeal which was filed. Lastly, Twin is not a party to the instant petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

The district court correctly applied the doctrine of equitable estoppel, for the debtors repeatedly represented to the bankruptcy court and to their creditors that Twin's portion of the proceeds from the sale of the Washington properties would be available to pay creditors of the debtors. The failure of the bank and the liquidating trustee to plead the doctrine of equitable estoppel in response to Gould's emergency motion is inconsequential, for under the applicable Bankruptcy Rules no response, including affirmative defenses, was required absent a court order, and there was no court order to do so. Moreover, the bank thoroughly briefed the elements of the doctrine of equitable estoppel in its answer brief filed with the district court. That court had discretion to consider all issues presented in the record.

The petitioners' arguments regarding substantive consolidation are entirely irrelevant in light of the Miami Center Liquidating Trust's right to Twin's share of the funds, as conferred in the confirmed plan.

The petitioners lack standing to maintain this appeal. They seek to enforce the alleged rights of a third party rather than their own rights, in derogation of well settled law. More importantly, the Miami Center Liquidating Trust, not Holywell, now controls Twin's stock in accordance with the plan of reorganization.

Lastly, this petition for writ of certiorari is moot in light of the fact that, as no stay was in effect, the plan has been implemented and the "Twin monies" were commingled with other cash and used to pay creditors pursuant to the plan. No effective relief is available to the petitioners who would not be due the money in any event, unless and until the plan provisions have been carried out.

ARGUMENT

I.

THE DISTRICT COURT'S APPLICATION OF THE DOCTRINE OF EQUITABLE ESTOPPEL WAS ENTIRELY PROPER

The district court's application of the doctrine of equitable estoppel was proper under the circumstances of the appeal.

A.

**The District Court held authority to base its
decision on the doctrine of equitable estoppel**

The petitioners' contention that the district court could not premise its ruling on the doctrine of equitable estoppel because estoppel was not pled at the bankruptcy court level is without merit, for Gould's request for clarification as to the ownership rights to the proceeds in Twin's account at Florida National Bank of Miami was brought as an emergency motion to which no response was mandated except as required by court order.

Gould's emergency motion was not brought as an adversary proceeding. His request for clarification was governed by Bankruptcy Rule 9014, which provides:

CONTESTED MATTERS

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. *No response is required under this rule unless the court orders an answer to a motion.* The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. *The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply.* An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. *The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable.* The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order. 11 U.S.C. Section 9014 (emphasis added).

The bankruptcy court never required the bank or the liquidating trustee to answer the motion, nor did the court direct that any of the other rules contained in Part VII of the Bankruptcy Rules be made applicable to the proceeding.

The petitioners complain that the Eleventh Circuit, by affirming the district court, "has vitiated rules of procedure promulgated by this Court and significantly departed from

accepted standards of review" (petition for writ of certiorari, p.21). The only aspects of the law "vitiating" by the petitioners' argument are the rules governing bankruptcy proceedings, for in their analysis the petitioners entirely ignore the Bankruptcy Rules. Gould filed an emergency *motion*, not an adversary complaint,⁴ and motions are governed by Bankruptcy Rule 9014. Rule 9014 incorporates a number of rules relating to adversary proceedings, but it does not include Rules 7008 or 7012, which would have required the liquidating trustee or the bank to file a responsive pleading containing affirmative defenses. This specific exclusion is consistent with Rule 9014's express provision that no formal response is required unless the court orders one. Notably, the petitioners do not argue that Bankruptcy Rule 9014 is unconstitutional. They simply ignore it and its effect.

The bankruptcy court did not order the filing of a response to Gould's emergency motion, nor did that court make any of the other Bankruptcy Rules applicable. In light of these uncontroverted facts, the petitioners cannot assert in good faith that the failure of the liquidating trustee to file a responsive pleading containing the affirmative defense of equitable estoppel prevented the district court from basing its decision on that theory. The petitioners entirely avoid reference to the Bankruptcy Rules in their analysis of this question, relying instead on Rule 52(a) of the Federal Rules of Civil Procedure, and cases that have no applicability to these facts.

The bank analyzed the elements of equitable estoppel in detail in its answer brief to Gould and Holywell's appeal of

⁴Rule 52(a) of the Federal Rules of Civil Procedure, relied upon by the petitioners to support their claim that the district court lack authority to base its decision on the doctrine of equitable estoppel, is applicable to *adversary* proceedings, not motions. See 11 U.S.C. Section 7052.

the bankruptcy court's order (A 19-39). The petitioners ignore this fact as well. The district court properly relied on the factors raised in the bank's answer brief to support its application of equitable estoppel. The decisions of the bankruptcy court, district court and Eleventh Circuit should be left undisturbed.

1.

A district court reviewing a bankruptcy court decision of a contested matter has discretion to consider an issue raised for the first time on appeal

A number of courts have held that a reviewing court has discretion to consider for the first time an issue not expressly raised before the bankruptcy court.

In the Ninth Circuit, a bankruptcy appellate panel has held it is not precluded from considering an issue not raised before the bankruptcy court where such consideration is determinative of the outcome of the appeal. *In re Windmill Farms, Inc.*, 70 B.R. 618 (9th Cir. B.A.P. 1987). Another court has held that where refusal to consider an issue raised for the first time on appeal will result in a miscarriage of justice, its consideration is appropriate. *Matter of Louisiana Industrial Coatings, Inc.*, 53 B.R. 464 (D.C. La. 1985). In addition, an appellate court may also consider an issue not raised before the bankruptcy court where the issue appears in the record, or sufficient facts have been pled so that the debtor is appraised of the issue. See *In re Baldwin*, 70 B.R. 612 (9th Cir. B.A.P. 1987); *Johnson v. Fairco Corp.*, 61 B.R. 317 (N.D. Ill. 1986); and *In re Zerodec Megacorp, Inc.*, 60 B.R. 884, on remand, 59 B.R. 272 (E.D. Pa. 1985).

The record below, replete with references to the petitioners' conduct, more than adequately put the petitioners on notice of the issue on which the district court based its

decision. More importantly, that record is clear that the district court properly exercised its discretion in this case, as a substantial miscarriage of justice would otherwise have resulted. See *In re Blumer*, 66 B.R. 109 (9th Cir. B.A.P. 1986); *In re Kenitra, Inc.*, 64 B.R. 841 (9th Cir. 1986). This is particularly true where the Bankruptcy Rules not only do not require a written response to a motion, they also do not require written affirmative defenses, such as equitable estoppel.

B.

The petitioners are equitably estopped from claiming the funds allegedly due Twin are not assets of the trust

All of the elements of equitable estoppel are present in this case. The petitioners do not dispute what constitutes the essential elements of an equitable estoppel:

1. words, acts, conduct or acquiescence by the party to be estopped that have the effect of misrepresenting material facts;
2. such words, acts, conduct or acquiescence by the party to be estopped are willfull or negligent; and
3. the other party relies in good faith on such words, acts, conduct or acquiescence, and is harmed as a result of that reliance.

In re Garfinkle, 672 F.2d 1340, 1347 (11th Cir. 1982), citing *Minerals & Chemicals Philip Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir. 1969); *Richards v. Dodge*, 150 So.2d 477 (Fla. App. 1963); and *State ex rel. Watson v. Gray*, 48 So.2d 84 (Fla. 1950); see also *Irvine v. Cargill Investor Services, Inc.*, 799 F.2d 1461 (11th Cir. 1986); *Highland Ins. Co. v. Trinidad &*

Tobago, 739 F.2d 536 (11th Cir. 1984); and *Travelers Indem. Co. v. Swanson*, 662 F.2d 1098 (11th Cir. 1981). Each one of these elements is present in this case.

1.

The debtors' statements, conduct and acquiescence, as well as Twin's conduct and acquiescence regarding the proceeds from the sale of the Washington properties caused the bankruptcy court and the creditors to believe the funds were "owned" by Holywell as dividends and were available to pay creditors

Prior to filing the emergency motion, the debtors and Twin led all of the creditors and the bankruptcy court to believe the funds would be available to pay creditors of the debtors.

First, Gould and Holywell represented in their 1984 motion to approve the sale of the Washington properties that the transaction would result in an "immediate cash infusion. . . which inures to Holywell and Gould [which] will provide the *Debtors* with capital much needed as an essential part of the reorganization sought in these proceedings" (emphasis added) (A 4). The petitioners now argue that this statement excluded funds due Twin, yet this contention contradicts other statements of Gould and Holywell. In that same motion, the petitioners sought an order "authorizing and approving the sale by Holywell and Gould of certain real and personal property *owned by Holywell and Gould* as partners and stockholders in Twin. . . ." (emphasis added) (A 2).

In addition, the district court found that prior to confirmation of the bank's plan, Holywell submitted a disclosure statement and a proposed plan of reorganization

which made it "manifestly" clear to the bankruptcy court and all creditors that these funds would be available to pay creditors (10a). The district court also found that Holywell and Gould filed certificates with the bankruptcy court regarding their proposed plans which revealed that funds in excess of \$14 million, including Twin's proceeds from the sale of the Washington properties, would be available to "quench" creditors' claims (10a). The district court also relied upon statements made by Gould, who testified that Twin's share of the Washington sale proceeds "had to go to Holywell as dividends" (10a). It is important to note that his testimony was given during a Rule 2004 examination immediately after the Washington sale.

The district court went on to cite additional findings with respect to the petitioners' misrepresentations:

In addition to these express representations, Gould and Holywell acquiesced in the Bank's justifiable presumption that Twin's proceeds from the Washington properties would be included within the debtors' estates. For example, the bankruptcy court directed Holywell to deposit into a segregated account any net funds payable to Twin from the sale of the Washington properties. Neither Gould nor Holywell [nor Twin] appealed this order by the bankruptcy court, but rather tacitly accepted the order of the court. Moreover, after the Bank moved for a determination that all funds, including the Twin proceeds, were cash collateral subject to the Bank's lien, the bankruptcy court ordered that the proceeds constituted 'cash collateral as defined in Section 363 of the Bankruptcy Code'. Neither Gould nor Holywell [nor Twin] took appeal from this order.

Subsequently, the Bank filed its proposed plan of reorganization, which directed that the proceeds

from the Washington properties attributable to Twin be incorporated with funds in the Miami Center Liquidating Trust and serve as a font for permissible claims against the debtors' estates. . . .

In totality, the express statements made by Gould and Holywell, amalgamated with their conduct and acquiescence respecting the availability of Twin's proceeds from the sale of the Washington properties, results in the conclusion that their representations caused the Bank to believe in, and rely on, the existence of a certain state of things: namely, that the Twin funds could be applied to creditors' claims against the liquidation fund established by the bankruptcy court. Accordingly, the first element of estoppel is satisfied (10-11a).

2.

Gould, Holywell and Twin acted willfully or negligently in misleading the bankruptcy court and creditors with respect to the sale proceeds

The district court correctly found that the second element of equitable estoppel was also met:

There can be no doubt that Holywell and Gould were, at the very least, negligent in not informing the Bank prior to this motion before the bankruptcy court that it did not intend to allow Twin's proceeds to be applied to creditors' claims. In point of fact, there is a strong inference stemming from Holywell's disclosure statement, the appellants' proposed plan of reorganization, Gould and Holywell's statement that the sale of the Washington properties would be beneficial to

creditors, and Gould's testimony, that the actions of Gould and Holywell were willful. In any event, it seems indisputable that Gould and Holywell failed to conduct themselves in a reasonable manner; by neglecting to object to the numerous orders of the bankruptcy court establishing the propriety of applying Twin's proceeds to creditors' claims, and by concealing from the Bank their true intention to thwart such a use of the proceeds if at all legally possible, the appellants evidenced the requisite intent under equitable estoppel (12a).

The facts go beyond those relied upon by the district court to support equitable estoppel in this case. In their initial brief on the appeal to the district court from the August 8, 1985 order of confirmation, the debtors stated:

Holywell and Gould also had equity participations in limited partnerships that owned three office buildings in the District of Columbia and Virginia [the Washington properties at issue]. The partnerships sold those office buildings for an aggregate price in excess of \$100,000,000. The sales were closed on December 31, 1984 and January 5, 1985. *Holywell and Gould* realized approximately \$32 million from these sales (case no. 85-3225-CIV-Aronovitz) (emphasis added).

Clearly, when the petitioners were attacking confirmation they did not acknowledge, as they do now, that Twin had any genuine participation in the \$32 million.

The petitioners claimed in their brief to the district court in their appeal from the Order on Emergency Motion for Clarification that they "raised vociferous objections as soon as it became clear in January 1986 how the Liquidating Trustee planned to use the Twin funds" (Appellants' Brief,

p. 30). That statement belies the facts. The bank's plan, served on the petitioners in the first part of 1985, states the balance of the Washington Proceeds will be available for distribution to the creditors (A 17). In addition, the November 22, 1985 report of the Liquidating Trustee, which was approved by order of the bankruptcy court, lists these funds as an asset of the trust. Neither the petitioners nor Twin appealed that order. Lastly, the debtor-petitioners never properly took issue with the plan provision regarding the Washington proceeds. In the bankruptcy court's findings and conclusions contained in the order of confirmation on remand, the court found that the proceeds from the sale of the Washington properties, some \$32 million, were the bank's cash collateral to be used to fund the trust and pay the debtors' creditors (A 6-9). The district court affirmed those findings, *Miami Center Limited Partnership v. The Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), and specifically noted the plan used "the proceeds from the sale by the debtors of certain realty owned by them in Washington, D.C." 59 B.R. at 345. The Eleventh Circuit held the debtor/petitioners' appeal was moot, as the plan had been substantially consummated and the court could not fashion effective relief. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). Twin *never* objected to the plan, *never* appealed from the order of confirmation, and *never* sought to intervene. That inaction is fatal to this proceeding.

3.

The liquidating trustee and creditors relied upon the petitioners' representations and conduct to their detriment

The bankruptcy court, the creditors, and later the liquidating trustee all relied to their detriment upon the petitioners' conduct and representations as to the use of the sale proceeds. The district court found that because of the

debtors' representations and conduct, the bank included the sale proceeds in its plan for distribution to creditors (12-13a). The district court concluded that the petitioners' statement that the sale of the Washington properties would accrue to the ultimate benefit of creditors with its cash infusion into the debtors' estates was relied upon by the bank in deciding not to object to the transaction (a12). The same could be said for all creditors who voted in favor of the bank's plan. In addition, the district court found that the bank relied on Holywell's disclosure statement, the petitioners' failure to complain about the part of the bank's plan in question and Gould's testimony, "all of which suggested expressly or implicitly that Twin's share of the proceeds from the sale of the Washington properties was available for payment to creditors" (a12-13). Again, the same statement regarding reliance could be said to apply to all creditors. Even more importantly, neither the petitioners nor Twin ever appealed the cash collateral order, which deemed the entirety of the sale proceeds to be the bank's cash collateral. In reliance on the petitioners' conduct, the bank funded the plan, in part, with the sale proceeds (its cash collateral), and the creditors voted for that plan. The plan was implemented in 1985, and the liquidating trustee has used the Twin proceeds to pay creditors since that date.

The liquidating trustee, the bankruptcy court and all of the creditors have relied to their detriment on the petitioners' representations. The petitioners are estopped from changing the story at this stage of the proceedings.

II.

THE ARGUMENT THAT TWIN WAS SUBSTANTIVELY CONSOLIDATED WITH THE DEBTORS AND THAT ITS ASSETS SEIZED WITHOUT DUE PROCESS IS FRIVOLOUS AND IRRELEVANT

The petitioners argue that the inclusion of the Washington proceeds in the plan is the equivalent of substantively consolidating Twin with the five debtors and that the inclusion of the Washington proceeds constitutes a seizure of property without due process. These arguments have no merit whatever in light of the fact that early in the bankruptcy proceedings Gould testified the funds in question are dividends due Holywell's estate, and all of Holywell's Section 541(a) defined assets became assets of the Miami Center Liquidating Trust upon confirmation of the plan.

The plan, as confirmed, did not substantively consolidate Twin with the debtors. There is no order of such substantive consolidation. The plan simply provided that the funds in question would become an asset of the trust available to pay creditors of the debtors.

No other assets of Twin, if there are any,⁵ were consolidated with the debtors' assets, "substantively" or otherwise. Substantive consolidation simply never happened, either as provided in 11 U.S.C. Section 105, or in any other way. The district court found that there was no substantive consolidation, for "Twin's assets and liabilities, with the exception of the proceeds from the sale of the Washington

⁵In its Schedule to its Statement of All Liabilities of Debtor, Holywell lists itself as the 100% stockholder of Twin. That schedule does not list any of Twin's liabilities. Rather, it lists Twin's value at \$13,210,000—the amount of the Washington proceeds payable to Twin (A 28).

properties, remained wholly intact under the plan of reorganization" (a13).

There has been no taking of a third party's property without due process, as the property in question (the Washington proceeds), as petitioner Gould testified, "had to go to Holywell as dividends" (a10). Thus, these funds, although technically earmarked as belonging to Twin, in fact belonged to Holywell by Gould's own admission. It is important to note that Gould, the sole shareholder of Holywell, was also the president, director, and sole agent of Twin. Because the funds belonged to a debtor's bankruptcy estate, it was entirely proper that they were utilized to pay creditors. The petitioners' argument to the contrary is meritless in light of these facts.

III.

THE PETITION FOR WRIT OF CERTIORARI IS MOOT

The petition for writ of certiorari is moot in light of the Eleventh Circuit's recent decision in *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), in which the Eleventh Circuit dismissed the debtors' appeal of the order of confirmation as moot because no stay was in effect, the plan had been substantially consummated, and thus the court could not fashion meaningful relief. That opinion is the subject of other proceedings in this Court by the petitioners by way of petitions for writs of certiorari and mandamus, case numbers 87-1988 and 87-1989, in which proceedings the liquidating trustee has filed briefs in opposition. The plan, as confirmed, is the law of the case.

This petition for writ of certiorari is moot because the asset in question was specifically made part of a plan of

reorganization, which was confirmed and substantially consummated. The money that the petitioners claim is due Twin was commingled with other trust monies and was used to pay over 400 innocent creditors. The law is well settled that an appeal will be dismissed as moot when events occur which prevent the court from fashioning meaningful relief, for Article III of the Constitution envisions a live controversy; it does not encompass the rendering of advisory opinions. *Central States v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988); *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987); *In re Golden Plan of California, Inc.*, 829 F.2d 705 (9th Cir. 1986); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Matos*, 790 F.2d 864 (11th Cir. 1986); *Matter of Andy Frain Services, Inc.*, 798 F.2d 1113 (7th Cir. 1983); *Matter of King Resources Co.*, 651 F.2d 1326 (10th Cir. 1980); *In re Revere Copper, & Brass, Inc.*, 78 B.R. 17 (Bkrtcy. S.D. N.Y. 1987); *In re Blumer*, 66 B.R. 109 (9th Cir. B.A.P. 1986).

It is equally well settled that in a bankruptcy proceeding, with no stay in effect, a court cannot undo a sale to a third party purchaser who is not before the court. *See In re Sun Valley Ranches, Inc.*, 823 F.2d at 1375; *Central States v. Central Transport, Inc.*, 841 F.2d at 96; *Matter of King Resources Co.*, 651 F.2d at 1331-32; *In re AOV Industries, Inc.*, 792 F.2d at 1147-48; and *Matter of Combined Metals Reduction Co.*, 557 F.2d at 188.

In this case, the Washington Properties were sold to a third party not before the Court. The sale proceeds have been used to fund the trust and pay creditors.

In determining that the court could not award the debtors effective relief, the Eleventh Circuit analyzed the effect of undoing this plan:

[The bank] surrendered \$30 million of cash collateral it was holding [the proceeds from the sale of the Washington properties]. These funds have been the primary source for payments to creditors and reserves totaling approximately \$30 million. . . . The trustee pressed his view that rejection [of the plan] would require him to seek to reclaim what he had paid out, much of which was unrecoverable. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d at 1556.

The Eleventh Circuit further stated that should the plan be unwound, as the debtors suggest, the bank might wish to realize on the cash collateral it held, but the court noted that "the debtors have not given a meaningful suggestion of how. . . . to get back the cash collateral; they say only that the creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them." *Ibid.*

A.

The effect of the petition for writ of certiorari would be a modification of the substantially consummated plan, which is prohibited.

The debtor/petitioners seek a piecemeal dismantling of a confirmed plan of reorganization, in derogation of well settled law. *In re AOV Industries, Inc.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986), cited with approval by the Eleventh Circuit in *Miami Center Limited Partnership v. The Bank of New York*, *supra*. The attempt to return Twin's share of the proceeds from the sale of the Washington properties is nothing more than an attempt to modify a substantially consummated plan. This the petitioners cannot do. See 11

U.S.C. Section 1127(b);⁶ *In re Sun Country Dev., Inc.*, 764 F.2d 406, 407 (5th Cir. 1985); *In re Information Dialogues, Inc.*, 662 F.2d 475, 476 (8th Cir. 1981); *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981); *In re Seminole Park and Fairgrounds, Inc.*, 505 F.2d 1011, 1014 (5th Cir. 1974); *Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697, 701 (10th Cir. 1964); *In re AT of Maine, Inc.*, 56 B.R. 55, 57 (Bkrtcy. D. Me. 1985); *In re Northampton Corp.*, 59 B.R. 963, 968-69 (E.D. Pa. 1984); and *In re Heatron*, 34 B.R. 526 (Bkrtcy. W.D. Mo. 1983).

The confirmed and unstayed plan, which specifically includes the funds at issue, is binding on all parties to the proceeding regardless of whether they accepted the plan. It is no longer subject to modification. *See In re St. Louis Freight Lines, Inc.*, 45 B.R. 546, 552 (Bkrtcy. E.D. Mich., N.D. 1984).

IV.

THE PETITIONERS LACK STANDING TO RAISE THE CLAIMS ASSERTED IN THE PETITION FOR WRIT OF CERTIORARI

All of the arguments contained in Petition for Writ of Certiorari center on the premise that the disputed funds belong to Twin. Assuming for the sake of argument that this is true, then the petitioners lack standing to raise these claims on behalf of Twin, as the petitioners cannot assert the rights of a third party. *See Lord v. Local Union No. 2088*, 481 F.Supp. 419, affirmed in part, revised in part, 646 F.2d 1057, rehearing denied, 654 F.2d 723, cert. denied, 458 U.S. 1160; *Rite-Research Improves Environment, Inc. v. Costle*, 78 F.R.D. 321, revised, 650 F.2d 1312.

⁶Section 1127(b) of the Bankruptcy Code provides: "The proponent of a plan or a reorganized debtor may modify such plan any time after confirmation of such plan and *before* substantial consummation of such plan. . . ." (emphasis added).

"At an irreducible minimum, Article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S.Ct. 752, 758, ____ U.S. ____, 70 L.Ed. 2d 700 (1982) (citations omitted). This the petitioners have failed to do. Their only claim is that Twin's assets, not theirs, have been taken.

As the Court has observed in *Baker v. Carr*, "the gist of the question of standing" is whether the petitioners have alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 369 U.S. 186, 204 (1962). Assuming that the petitioners' claim that the funds belonged to Twin is true, then the petitioners clearly have no personal stake in the outcome of the controversy. Moreover, in light of the tenor of the petitioners' arguments, it should be noted that "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge Christian College*, 102 S.Ct. at 765. The petitioners cannot confer standing on themselves by asserting the rights of others. *R. T. Vanderbilt Co. v. OSHA Rev. Comm.*, 708 F.2d 570, 574 (11th Cir. 1983); *Matter of Johns-Manville Corp.*, 68 B.R. 618 (Bkrtcy. S.D. N.T. 1986).

The plan, as confirmed, provides that all of the debtors' assets, as defined by Section 541(a) of the Bankruptcy Code, are assets of the trust. Section 541(a) includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. Section 541(a)(1). The scope of the definition of "property" in Section 541(a)(1) is

extraordinarily broad and includes all types of property and rights to property which the debtor possesses. *In re Golden Plan of California, Inc.*, 37 B.R. 167 (Bkrtcy. Ca. 1984); *In re Koch*, 14 B.R. 64 (Bkrtcy. Kan. 1981). This property right encompasses all the stock owned by a debtor, including the stock of wholly owned subsidiary companies of a corporate debtor. *In re Deak and Co., Inc.*, 63 B.R. 422 (Bkrtcy. S.D. N.Y. 1986) (shares of stock owned or controlled by the debtor were property of the estate thereby providing the bankruptcy court with *in rem* jurisdiction in an adversary proceeding to declare stock pledge a voidable preference); *In re Peoples Bankshares, Ltd.*, 68 B.R. 536 (Bkrtcy. N.D. Iowa 1986); *In re Wallace*, 66 B.R. 834 (Bkrtcy. E.D. Mo. 1986). Thus, all of the stock owned by the petitioners, including the stock of Twin, became property of the Miami Center Liquidating Trust pursuant to the express terms of the confirmed plan. The petitioners lack standing to assert otherwise.⁷

Even if Holywell were still entitled to claim and use the stock of Twin, Holywell would not have standing to raise the issues contained in the petition for writ of certiorari; only Twin would have this power, and it *never* has exercised it.

A shareholder may institute a derivative lawsuit to enforce rights of a corporation under certain conditions, but this never happened here. No shareholder's derivative action

⁷Twin has brought suit against the liquidating trustee in his individual capacity in the United States District Court for the Western District of Virginia, for a preliminary and permanent injunction to prevent the trustee from taking any action with respect to the stock, to quiet title, to recover its stock certificates on behalf of Holywell, to establish that Holywell is the sole shareholder and to recover money damages (A 81-86). Interestingly enough, Holywell, the real party in interest, is not a party in that proceeding.

on behalf of Twin was begun by Holywell (assuming Holywell still controls Twin's stock, a fact which the liquidating trustee strongly disputes) or by the Miami Center Liquidating Trust. The present appeal arose out of an emergency *motion* filed by Gould and Holywell for clarification of the ownership of the proceeds from the sale of the Washington properties. All other issues are collateral.

CONCLUSION

The instant petition is yet another of the debtors' collateral attacks on the confirmed plan. That Twin never appealed any of the relevant orders and that the petitioners seek to assert a claim on behalf of Twin lends further credence to the bankruptcy court's finding that the difficulty in tracing the obligations and claims against the affiliated creditors was "completely attributable to the labyrinth that Gould has created." *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d at 852. It is now too late to modify the confirmed plan, for the funds at issue have been co-mingled with other trust assets and used to pay creditors. The plan has been substantially consummated and the Court cannot award meaningful relief. The issue is moot. Moreover, the petitioners lack standing to raise the claims presented in their petition.

Lastly, the district court was correct in applying the doctrine of equitable estoppel to prevent Gould and Holywell from reneging on their earlier representations as to the availability of the funds in question to pay creditors. The petitioners and Twin misled the bankruptcy court and the creditors into believing these monies were to be used to pay creditors of the debtors.

The petition for writ of certiorari should be denied on the merits. Alternatively, these proceedings should be dismissed on the ground of mootness and on the additional ground that the petitioners lack standing to assert claims belonging to a third party.

RESPECTFULLY SUBMITTED,

Herbert Stettin, Esquire



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VERIFICATION

Theodore B. Gould, being first duly sworn, deposes and says:

I am the President of Twin Development Corporation, the Plaintiff herein; I have read the contents of this Complaint, including the request for Preliminary Injunction, Permanent Injunction, and Declaratory Relief, and believe the same to be true according to the best of my knowledge, information, and belief.

/s/ THEODORE B. GOULD

Theodore B. Gould, President
Twin Development Corporation

Sworn to and Subscribed before me this 4th day of August, 1987.

/s/ FAYE M. McBURNEY

Notary Public

My Commission Expires: My Commission Expires June 29, 1990

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case Nos. 84-01590-BKC-TCB
through 84-01594-BKC-TCB

In Re:

HOLYWELL CORPORATION, et al.,

Debtors.

**MOTION FOR ORDER APPROVING AND
AUTHORIZING HOLYWELL CORPORATION AND
THEODORE B. GOULD TO CONSUMMATE THE
SALE OF CERTAIN REAL AND PERSONAL PROPERTY**

Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), debtors and debtors-in-possession, move this court for an order authorizing and approving the sale by Holywell and Gould of certain real and personal property owned by Holywell and Gould as partners and stockholders in Twin Development Corporation, a Virginia corporation ("Twin"), 1300 North 17th Street Associates, a Virginia limited partnership ("1300"), 1616 Reminc Limited Partnership, a Virginia limited partnership ("1616"), Eleven DuPont Circle Associates, a District of Columbia limited partnership ("Eleven") and DuPont Land Associates, a District of Columbia limited partnership ("DuPont Land") (collectively the "Sellers"), pursuant to §363(b) of the Bankruptcy Code and as grounds therefor state:

1. On August 22, 1984 (the "Filing Date"), Holywell, Gould and the other debtors herein (collectively the

"Debtors") each filed a petition for reorganization under Chapter 11, §301 of the Bankruptcy Code (the "Code") and each has continued in the management and operation of its respective business and properties as a debtor-in-possession pursuant to §1107 and §1108 of the Code. The within Chapter 11 cases are being jointly administered pursuant to order of this Court. No trustee or examiner has been appointed.

2. The Debtors are principally engaged in the business of owning and operating office buildings, hotels and other commercial real property.

3. Gould, one of the Debtors herein, is the President of Twin and is the managing general partner of 1300, 1616, Eleven and DuPont Land. Holywell, one of the Debtors herein, owns all of the issued and outstanding shares of common stock of Twin. Gould owns all of the issued and outstanding shares of common stock of Holywell.

4. Sellers have entered into a Purchase Agreement (the "Purchase Agreement"), dated July 26, 1984, with Hadid Investment Group, Inc., a Virginia corporation, and/or assigns ("Hadid"), which was amended by First Amendment to Purchase Agreement between Sellers and Hadid dated August 28, 1984 (the "First Amendment"), whereby Hadid shall acquire all of Seller's right, title and interest in and to two office buildings located in Arlington, Virginia, and commonly referred to as the 1616 Property and the Twin Property, and one office building located in Washington, D.C. and commonly referred to as the Washington Property, for a purchase price of One Hundred Twelve Million Dollars (\$112,000,000). A copy of the Purchase Agreement and the First Amendment are annexed hereto and incorporated herein as Exhibit "A" and reference should be made thereto for the specific terms and provisions thereof. Since the inception of these Chapter 11 proceedings, Holywell and Gould have been unable to proceed with the closing of the

Purchase Agreement inasmuch as their status as Debtors-in-Possession has effectively precluded the Seller's ability to close and consummate the sale transaction as contemplated by the Purchase Agreement. Additionally, the entry of an Order of this Court authorizing Holywell and Gould, Debtors herein, to sell their right, title and interest in the real and personal property is a condition precedent to the closing of the transaction.

5. The purchase price for the subject properties, as set forth in the Purchase Agreement, is fair and equitable, and represents not less than the fair market value of such property, having been negotiated at arm's length. The Purchaser has no affiliation with any Seller entity or with any Debtor in these proceedings.

6. Consummation of the transaction proposed herein is in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale which inures to Holywell and Gould will provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings.

7. Under §363(b) of the Code, a Debtor-in-Possession, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate. Bankruptcy Rule 2002(a) (2) provides that in the event of a sale pursuant to §363(b), the Debtor-in-Possession shall give all creditors not less than Twenty (20) days notice of the hearing on such sale. The Debtors intend to comply with the notice requirements set forth in Bankruptcy Rule 2002.

WHEREFORE, movants pray for the entry of an order:

(a) Approving and authorizing Holywell and Gould to consummate the sale of the 1616 Property, the Twin Property and the Washington Property to Hadid upon the terms and conditions set forth in the Purchase Agreement and the First Amendment; and

(b) Granting such other and further relief as this Court deems just and proper.

Dated: Miami, Florida
September 28, 1984

KENT, WATTS, DURDEN, KENT,
NICHOLS & MICKLER

By /s/ Fred H. Kent, Jr.
Fred H. Kent, Jr.
Robert C. Nichols

850 Edward Ball Building
Jacksonville, FL 32202
904/354-1600

Attorneys for Debtors

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Cases Nos. : 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtors.

ORDER ON EMERGENCY MOTION TO TREAT
PROCEEDS OF THE SALE AS CASH COLLATERAL,
TO SEGREGATE AND ACCOUNT
FOR CASH COLLATERAL

The Bank of New York ("BNY", a secured creditor, moves this Court, pursuant to Bankruptcy Code § 363 and Bankruptcy Rules 4001 and 9014, for an order to compel the Debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Remine Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle"), and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") as cash collateral.

The Court examined the memoranda which were filed both in support of and in opposition to the Motion of

BNY, and having heard representation by the attorneys for Debtors, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), as well as argument by the parties hereto, the Court finds as follows:

(a) This Court entered an Order on the 11th day of December, 1984, requiring that all of the beneficial interests of Gould and Holywell to the net proceeds from the sale of the Washington Properties are to be placed in a segregated, interest bearing account and held pursuant to further order of this Court.

(b) BNY appears to have a first lien on the interests of Holywell and Gould in the net proceeds from the sale of the Washington Properties, except for an amount of \$264,669. Attorneys for the Creditors' Committees did not object to the claim of BNY at this hearing, although they have reserved the right to contest BNY's claim to a first lien at a future time if they desire to do so.

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.

(d) Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of that sale and any interest it may receive from the investment of those net proceeds. Therefore, Holywell requires the use of a portion of the net proceeds of that sale in the immediate future to pay current, ordinary business expenses, including salaries, and will continue to require monies from either the net proceeds of the sale or interest income from the investment of those proceeds until such time as Holywell can wind up the affairs of those selling entities.

(e) BNY has agreed to the use of the proceeds of the sale and/or interest for the expenses of Holywell subject to the prior approval by BNY of those expenses, and has agreed to an amount of \$70,000 to be released immediately for the payment of December salaries payable on December 31, 1984, and other business expenses payable in January, 1985.

Upon consideration of the following, it is

ORDERED and ADJUDGED as follows:

1. This Court's Order of December 11, 1984 shall continue unchanged except as supplemented herein.

2. The net proceeds of the Washington sale constitute cash collateral as defined in § 363 of the Bankruptcy Code.

3. The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of \$264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank of New York in subsequent, appropriate proceedings.

4. An amount of \$70,000 shall be released immediately to Holywell to pay its salaries and other business expenses due on December 31, 1984 and during January 1985.

5. Holywell shall submit to the Bank of New York each month its anticipated expenses, including salaries, for the subsequent month. If the Bank of New York approves those expenses as submitted, they will be released without further order of this Court.

DONE and ORDERED in Miami, Florida this 31 day
of December 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esq.

All Members of the Creditors' Committees

All Attorneys of Record

Service of this Order to be performed
by Fred H. Kent, Jr.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB

In re:

HOLYWELL CORPORATION, a Delaware corp.,

Debtor.

DISCLOSURE STATEMENT

Exhibit "E" [to Holywell's Disclosure Stmt]

**HOLYWELL CORPORATION
(DEBTOR IN POSSESSION)
LIQUIDATION ANALYSIS
FEBRUARY 15, 1985**

	ASSETS (2/15/85)	LIQUIDATION VALUE
1. Cash	\$15,110,000	\$15,110,000
2. Advances due from MCLP	4,080,000	0
3. Loans due from Officer	2,015,000	0
4. Note due from MCLP	490,000	490,000
5. Mortgage note due (Charleston)	50,000	50,000
6. Accounts receivable	183,000	170,000
7. Furniture and equipment, net	64,400	20,000
8. Investments—Twin Development Corp.	13,128,533	13,128,533
9. Investments—Washington subsid. corps.	550,000	550,000
10. Investments—Miami subsid. corps.	9,168,000	0
11. Investments—Affiliated ptns.—1300	925,000	0
12. Investments—Affiliated ptns.—MCLP	5,250,000	0
TOTAL LIQUIDATION VALUE	\$51,013,933	\$29,518,533
PRIORITIES (2/15/85)		
1. Secured debt	\$ 2,015,000	\$ 2,015,000
2. Estimated costs and expenses of liquidation	150,000	150,000
3. Post-petition priority creditors	20,000	20,000
4. IRS—corp. taxes		15,000,000
TOTAL PRIORITIES	\$ 2,185,000	\$17,185,000
TOTAL AVAILABLE FOR DISTRIBUTION TO UNSECURED CREDITORS	\$48,828,933	\$12,333,533

[This Liquidation Analysis is qualified by and should be read in conjunction with the notes that follow it.]

Exhibit "C" [to Holywell's plan]

HOLYWELL CORPORATION
PRO FORMA BALANCE SHEET
FEBRUARY 15, 1985

ASSETS

INVESTMENTS

Twin Development Corp.—Cash	\$13,128,533
Other subsidiary corps.—Washington	550,000
Other subsidiary corps.—Miami	9,168,000
Affiliated partnerships—1300	925,000
—MCLP	<u>5,250,000</u>
	\$29,021,533

OTHER ASSETS

Cash	\$15,110,000
Advances and interest receivable—MCLP	4,080,000
Loans and interest receivable—Officer	2,015,000
Note receivable—MCLP	490,000
Mortgage note receivable	50,000
Accounts and interest receivable	183,000
Furniture and equipment, net	<u>64,400</u>
	\$21,992,400

TOTAL ASSETS	\$51,013,933
--------------	--------------

LIABILITIES

Accounts payable	\$ 900,000
Notes payable—1300	380,000
Notes and interest payable—BNY	<u>2,015,000</u>
	\$ 3,295,000

NET EQUITY	\$47,718,933
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**HOLYWELL CORPORATION
(DEBTOR IN POSSESSION)
NOTES TO LIQUIDATION ANALYSIS
FEBRUARY 15, 1985**

A. ASSET LIQUIDATION VALUE

Values shown are based on the company's estimation that on forced liquidation, the Company's assets would produce the following percentage of recovery:

Cash	100%
Advances, loans and other due from MCLP	9%
Accounts and mortgages receivable	94%
Investments—Washington subsidiary corps.	100%
Personal property	31%

B. BOOK VALUE OF INVESTMENTS—WASHINGTON SUBSIDIARY CORPS.

The book value for wholly owned Washington, D.C. based subsidiary corporations is based on the net realizable value of receivables due to the corporations by independent third parties.

C. AMOUNT OF SECURED DEBT

The amount of secured debt shown involves interest, all of which is due to the Bank of New York.

D. SECURED DEBT GUARANTEES AND CONTINGENCIES

The Miami Center Limited Partnership and Chopin Associates construction and land loan of \$195,086,028 and accrued interest of approximately \$30,492,880 are secured by (1) first deeds of trust on the land and leasehold; (2) substantially all the assets of Holywell Corporation; and (3) the personal guarantee of Theodore B. Gould.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

In re:

HOLYWELL CORPORATION, et al.,

Debtors.

**AMENDED CONSOLIDATED DISCLOSURE
STATEMENT OF HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
CHOPIN ASSOCIATES, MIAMI CENTER
CORPORATION AND THEODORE B. GOULD
PROPOSED BY THE BANK OF NEW YORK**

**AMENDED CONSOLIDATED
DISCLOSURE STATEMENT**

This Amended Disclosure Statement is submitted on behalf of The Bank of New York ("BNY") in support of its Consolidated Plan of Reorganization ("BNY's Plan"). BNY's Plan, dated February 26, 1985, as amended, is on file with the Bankruptcy Court and a copy is annexed hereto as Exhibit 1.

BNY is the major secured creditor of each of the Debtors. The Debtors are indebted to BNY, under direct and guarantee obligations, in the amount of approximately \$234,342,743 as

of March 1, 1985, which amount does not include expenses of approximately \$1,611,563 to March 14, 1985. Interest and expenses are currently accruing at a rate of approximately \$2,300,000 per month. BNY holds, as security for the indebtedness, *inter alia*, first mortgages on Miami Center, which has an appraised value of \$255,600,000 and a first security interest in approximately \$32,422,798 in cash. Under BNY's Plan, which contemplates a substantive consolidation of the estates and a liquidation of the assets, BNY will purchase Miami Center for \$255,600,000, within 45 days from the Effective Date. Upon such purchase, BNY will release all other collateral that it holds as security for the BNY Debt, including its security interest in the \$32,422,798 in cash, subject, however, to the security interest in such cash and other collateral that BNY will retain as collateral for the BNY-Holywell Loan in the principal amount of \$1,750,000.

Based on a prompt sale of Miami Center and the release of those funds, it is anticipated that all administrative claims, all priority claims and all claims of unsecured creditors, other than Affiliated Creditors, will be paid substantially in full or in full. Based on the Debtors' analysis of the outstanding claims, an equity may remain for the Debtors.

THE FINANCIAL INFORMATION CONTAINED IN THIS DISCLOSURE STATEMENT RELATING TO THE INDEBTEDNESS OF THE DEBTORS TO BNY AND THE SECURITY THEREFOR WAS PREPARED BY BNY FROM ITS RECORDS AND THE INFORMATION TO THE BEST KNOWLEDGE OF BNY IS ACCURATE AND COMPLETE. CERTAIN FINANCIAL AND OTHER INFORMATION WAS OBTAINED FROM THE DEBTORS' PLANS. ACCORDING TO THE DEBTORS' PLANS, SUCH INFORMATION WAS PREPARED BY AGENTS AND EMPLOYEES OF THE DEBTOR AND HAS NOT BEEN AUDITED; HOWEVER, ACCORDING TO THE DEBTORS' PLANS THE INFORMATION IS ACCURATE AND

COMPLETE TO THE BEST KNOWLEDGE OF SUCH AGENTS AND EMPLOYEES. CERTAIN OTHER INFORMATION WAS PROVIDED BY GOULD AND CERTAIN OTHER DEBTORS TO BNY FROM TIME TO TIME PRIOR TO THE FILING OF THESE CASES. BNY HAS NO INDEPENDENT KNOWLEDGE OF THE TRUTH, COMPLETENESS OR ACCURACY OF SUCH INFORMATION.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

CHAPTER 11 Proceedings

IN RE:

HOLYWELL CORPORATION, et. al.

Debtors

AMENDED CONSOLIDATED PLAN OF
REORGANIZATION PROPOSED BY
THE BANK OF NEW YORK

V. CREATION OF TRUST

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of §541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

2. On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however*, to all existing liens, mortgages, security interests and encumbrances.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-0848-Civ-Ryskamp

(Bankruptcy Cases No.
84-01590-BKC-TCB and
84-01594-BKC-TCB)

HOLYWELL CORPORATION, and
THEODORE B. GOULD,

Debtor/Appellants,

v.

THE BANK OF NEW YORK, and
FRED STANTON SMITH,
as Liquidating Trustee,

Appellees.

On Appeal from the United States Bankruptcy Court
for the Southern District of Florida

ANSWER BRIEF OF APPELLEE,
THE BANK OF NEW YORK

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JURISDICTION

This Court has jurisdiction over appeals from orders of the Bankruptcy Court under 28 U.S.C. §158 and Bankruptcy Rule 8001 *et seq.* However, as set forth in Section II of this brief, the Court should decline to exercise jurisdiction over the subject matter of this particular appeal on grounds of mootness. The funds in controversy below have been paid or otherwise irrevocably applied in accordance with the terms of a plan of reorganization proposed by appellee, The Bank of New York (the "Bank"), duly confirmed on August 8, 1985 by the Bankruptcy Court. The Confirmation Order was subsequently affirmed by the United States District Court on March 20, 1986.¹ The appellants did not post a supersedeas bond (as required by the District Court) in order to stay the consummation of the plan, and it has now been substantially consummated. Mr. Gould himself, who is one of the appellants here and was also sole shareholder of the other appellant, stated in open court on June 9, 1986, that, "this plan has obviously been substantially consummated."²

Thus, the relief sought by the appellants would dismember a plan of reorganization that has been confirmed, affirmed, and substantially consummated, and that has not been stayed. That relief is neither fair nor possible, and accordingly this appeal should be dismissed as moot. *In re Matos*, 790 F.2d 864 (11th Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); 11 U.S.C. §1101(2).

¹*Holywell Corp., et al, v. The Bank of New York*, Case No. 85-3225-Civ-Aronovitz.

²Court Paper Number 1314, page 73; excerpt attached as Bank's App. 1. "Bank's App. ____" is a reference, by tab number, to the record excerpts attached to this brief.

STATEMENT OF THE ISSUES

I. Was the Bankruptcy Court's Order of January 28, 1986 "Clearly Erroneous"?

II. Is This Appeal Moot?

STANDARD OF REVIEW

The Bankruptcy Court's finding of fact are to be affirmed unless "clearly erroneous". Bankruptcy Rule 8013. To the extent that the Bankruptcy Court's findings were affirmed by District Judge Aronovitz's Order affirming confirmation of the Plan [Dbt. App. 387],³ the clearly erroneous standard must be given "strict application". *In re Garfinkle*, 672 F.2d 1340, 1344 (11th Cir. 1982).

STATEMENT OF THE CASE

The appellants are two of five related debtors in the Chapter 11 bankruptcy proceedings below. Debtor Theodore B. Gould ("Gould") owned 100% of the stock of Debtor Holywell Corporation ("Holywell"), and also served as President and a director of Holywell. In turn, Holywell owned 100% of the stock of Debtor Miami Center Corporation ("MCC"); Gould served as President and a director of MCC as well. Gould and MCC were the sole general partners of Debtor Chopin Associates ("Chopin") and of Debtor Miami Center Limited Partnership ("MCLP"). All five Debtors were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami. The complex interrelationships among the Debtors and other affiliated entities are depicted on Bank's App. 2.

³"Dbt. App. 387" is a reference to page 387 of the appendix to the debtor/appellants' brief.

Debtor Holywell owned many subsidiaries other than Debtor MCC. One such non-debtor subsidiary, wholly-owned by Holywell, was Twin Development Corporation ("Twin"). Gould served as President and as a director of Twin as well.

The Bank was the construction lender for the Miami Center Project, and held a secured claim in the bankruptcies for over \$200 million. In an adversary proceeding to establish its lien, the Bank obtained a judgment for over \$234 million as of March 14, 1985, with interest accruing at over \$2 million per month thereafter [Bank's App. 3]. The Bank disputes the Debtors' chronology in their "Statement of the Facts" as to both accuracy and relevance. Since the focus of this appeal should be upon the rights of various parties to the \$13,163,490 realized by Twin from the sale of its Washington, D.C. office building, it is important to review carefully the record on that subject.

1. On June 23, 1983, Holywell pledged the stock of Twin (and other subsidiaries) to the Bank to secure Holywell's guaranty of the construction loans [Dbt. App. 258].

2. On February 1, 1984, Holywell and the other Debtors defaulted on the loan obligations, and the loans remained in default through the filing of the bankruptcy petitions on August 22, 1984 [C.P. No. 385h, pages 176-77].⁴ By virtue of the default and the terms of the stock pledge, the Bank had the right to exercise all rights of ownership over the Twin stock [Dbt. App. 272-77].

3. The money realized by Twin was part of the "Washington Proceeds"—approximately \$30 million in net

⁴"C.P. No. ____" refers to the Bankruptcy Court Paper Number of a document in the Bankruptcy Court record below. "Adv. Pro. No. ____" indicates that a particular document was separately docketed in a designated adversary proceeding within the five bankruptcy cases.

proceeds received by the five debtors (the "Gould Group") from the sale of three properties in Washington D.C. in December, 1984 and January, 1985. Until they filed the motion at issue here, Gould and Holywell always recognized and agreed that the Washington Proceeds would be used to pay allowed claims against the debtors:

(a) Gould and Holywell admitted their ability to control Twin and its assets by seeking Bankruptcy Court approval in October, 1984 for the sale of Twin's real estate [Dbt. App. 1]. In that motion, Gould and Holywell acknowledged that Bankruptcy Court approval of the sale of Twin's real estate was a condition precedent to the closing [Dbt. App. 3, Paragraph 4; Dbt. App. 64]. More significantly, Gould and Holywell represented to the Bankruptcy Court and to the hundreds of creditors (including the Bank) that:

6. Consummation of the transaction proposed herein is in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale *which inures to Holywell and Gould* will provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings. [Dbt. App. 3; emphasis supplied].

Thus, Holywell and Gould represented and admitted that Twin's share of the net proceeds of sale (ultimately \$13.1 million) was to be controlled and/or utilized by Holywell and Gould. If, as the appellants now argue, Twin was an independent entity, there would have been no reason or necessity for Gould and Holywell to have sought Bankruptcy Court approval for the sale of Twin's property.

(b) Based upon the representations by Gould and by Holywell that Twin's proceeds would be a "cash infusion" for the two Debtors, the Bank and other creditors did not

oppose the sale, and all parties agreed that the sales proceeds should be (a) segregated and (b) subject to the jurisdiction of the Bankruptcy Court [Dbt. App. 68 to 71]. The Bankruptcy Court directed that:

1. Holywell shall cause Twin Development Corp. ("Twin"), a wholly owned subsidiary of Holywell, to deposit into a segregated account, subject to further order of this Court, any net funds payable to Twin from the sale of certain improved real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended August 26, 1984, between Hadid Investment Group, Inc., as purchaser and Twin, 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Eleven Dupont Circle Associates and Dupont Land Associates as sellers (the "Purchase Agreement").

* * *

3. Holywell and Gould shall deposit all funds, including any beneficial interest, into a segregated account, subject to further order of this Court including any and all funds payable to or by Gould, Holywell or to any other entity or entities which are owned (wholly or partially) or controlled (wholly or partially) by Holywell and/or Gould as a result of the sale of the Washington Properties. The funds shall not include the proceeds payable to any independent person or entity in which neither Gould, Holywell, nor any related entity has any interest of any nature whatsoever. [Dbt. App. 68-70]

Neither Twin nor either of the appellants appealed that Order of December 16, 1984.

(c) Thereafter, the Bank moved for a determination that all such funds, *including* the Twin proceeds, were cash collateral subject to the Bank's lien [Bank's App. 4]. After a hearing, the Bankruptcy Court granted that motion [Dbt. App. 77 to 80]. Specifically, the Bankruptcy Court determined in an Order of December 31, 1984, that, "the net proceeds of the Washington sale constitute cash collateral as defined in §363 of the Bankruptcy Code" [Dbt. App. 79]. Once again, neither Twin nor either of the appellants took an appeal from the entry of that Order.

(d) Subsequently the Debtors filed Schedules and Statements of Affairs listing their respective assets and liabilities. Holywell admitted its 100% control over Twin, and the absence of any liabilities on the part of Twin, by scheduling Twin's value in the Holywell Schedules as \$13,210,000.00—the amount of Washington Proceeds payable to Twin. [C.P. No. 275, Schedule B-2; Bank's App. 5].

(e) Thereafter, the Debtors promulgated separate (but similar) disclosure statements and plans of reorganization. The Holywell disclosure statement advised creditors that Twin's cash from the "Washington Proceeds" would be used to pay the claims of creditors [C.P. No. 466, page 4].

(f) Next, the Bank proposed a plan of reorganization and companion disclosure statement (the "Bank's Plan"). As amended, the Bank's Plan clearly disclosed that the "Washington Proceeds", including Twin's proceeds, would (1) become part of the Miami Center Liquidating Trust and (2) be used to pay Allowed Claims [Dbt. App. 96, 101-02, 115, 124-25]. The Bank's disclosure statement listed the exact amount of the Washington Proceeds, \$32,422,798.37, so it was unmistakable that Twin's proceeds were included [Dbt. App. 96, 101]. The Bank reiterated that, "the Bankruptcy Court has determined that the Washington Proceeds are BNY's [the Bank's] cash collateral" [Dbt. App. 102]. Although

the debtors and various related entities filed numerous objections to the Bank's Plan [C.P. No. 534, 545, 580, 849, 888a], *neither Twin nor either of the appellants ever objected* to the inclusion and use of Twin's proceeds as part of the Bank's Plan.

(g) Pursuant to the Bankruptcy Court's Orders, both the debtors and the Bank were required to file certificates relating to the voting by creditors and to the source of cash to fund their respective plans of reorganization. On May 13, 1985, counsel for the appellants certified that \$14,738,000 was available to fund the debtors' proposed plans, including funds in the "Twin Development Trust Account" at Florida National Bank [C.P. No. 664; Bank's App. 6]. In so certifying, the debtors again evidenced their complete control over Twin's interests in the Washington Proceeds, and the clear understanding that such funds would be used—under both the debtors' and the Bank's proposed plan—to pay creditors.

(h) When the Bankruptcy Court confirmed the Bank's Plan [August 8, 1985, Dbt. App. 237], (1) Twin did not take an appeal and (2) the debtors never raised, as an issue on appeal, the disposition of Twin's \$13.1 million pursuant to the terms of the Bank's Plan. To the contrary, in their initial brief in the appeal from the Confirmation Order,⁵ the debtors stated as a fact that:

Holywell and Gould also had equity participations in limited partnerships that owned three office buildings in the District of Columbia and Virginia. The partnerships sold those office buildings for an aggregate price in excess of \$100,000,000. The sales were closed on December 31, 1984 and January 5, 1985. *Holywell and Gould* realized approximately \$32 million from these sales. [emphasis supplied].

⁵Case No. 85-3225-Civ-Aronovitz; the initial brief is docket item number 13 in that case, and the quotation is from page 9 of the brief.

Similarly, Twin and the appellants did not raise the argument that they now raise—that substantive consolidation was a “subterfuge” to take Twin’s money—at the hearing on substantive consolidation on July 18, 1985 [Dbt. App. 417].

(i) Thereafter, neither Twin nor either of the appellants posted an appeal bond (as required by the District Court) in order to stay the implementation of the Bank’s Plan. Accordingly, the Liquidating Trustee was appointed [Dbt. App. 241] and began to pay creditors with the funds in the Liquidating Trust. If Twin or the appellants truly intended to prevent the use of *Twin’s proceeds* to pay allowed claims as provided by the Bank’s Plan, it was incumbent upon Twin and/or the appellants to post an appeal bond as required.

(j) On November 22, 1985, the Liquidating Trustee filed his first report, which clearly listed the Twin cash as an asset subject to disposition by the Liquidating Trustee [Dbt. App. 293, 300]. The Bankruptcy Court entered an Order approving the report on November 26, 1985 [Dbt. App. 301-03]. Neither Twin nor either of the appellants took an appeal from that Order.

(k) On December 30, 1985, the District Court remanded the Debtors’ appeal from the Confirmation Order back to the Bankruptcy Court for the entry of more detailed findings of fact and conclusions of law [Dbt. App. 309]. Although invited and directed to raise any issue during the remand, the appellants never mentioned the Plan’s utilization of Twin’s proceeds. The Bankruptcy Court entered detailed findings and conclusions on January 29, 1986, as requested [Dbt. App. 329], reciting again that the Washington Proceeds of approximately \$30 million (which included Twin’s share) were the Bank’s cash collateral [Dbt. App. 344] and were to be used to pay creditors. The District Court affirmed those findings [Dbt. App. 387], noting specifically that the Bank’s Plan utilized, “the proceeds of the sale by the debtors

of certain real property owned by them in Washington, D.C. (\$32,000,000)" [Dbt. App. 396]. In their appeal to the Eleventh Circuit from that District Court Order,⁶ the debtors have not disputed that determination by the District Court.

(1) Nonetheless, the appellants asked the Bankruptcy Court to "clarify" that Twin's portion of the Washington Proceeds could not be used by the Liquidating Trustee to pay creditors [Dbt. App. 244]. When the Bankruptcy Court ruled against the appellants and they initiated this appeal, however, they did not obtain a stay pending the appeal. Accordingly, the Liquidating Trustee has continued to use Twin's proceeds (as provided by the Bank's Plan) to pay creditors.

4. Twin never appeared separately in the bankruptcies below. In keeping with its membership in the Gould Group and its 100% ownership by debtor/appellant Holywell, Gould's and Holywell's lawyers always spoke on behalf of Gould and Holywell for Twin (as they continue to do in this appeal). Twin never filed objections to the Bank's Plan, and Gould (as President of Twin) controlled Twin's funds. Gould testified that Twin's funds *had* to be paid to Holywell:

Q. Twin Development Corporation?

A. It's a wholly-owned subsidiary of Holywell.

Q. What does it do?

A. It owned the general partnership in 1300 North 17th Street.

⁶Case No. 86-5286, pending in the Eleventh Circuit.

Q. That had something to do with the Washington property?

A. It is one of the buildings in the Washington area.

Q. If one of those subsidiaries had some money coming out of that closing, that would have gone to Holywell?

A. It *has to go to Holywell* as dividends.

[C.P. No. 385h, pages 49-50, emphasis supplied].

The foregoing facts, omitted from the appellants' "Statement of the Case", demonstrate that the appellants always understood and agreed that Twin's assets were under the control of the appellants and would be used to pay creditors under the debtors' plans *or* the Bank's Plan, whichever the Bankruptcy Court confirmed.

ARGUMENT

I. The Bankruptcy Court Ruled Correctly That Twin's Funds Were Part of The Liquidating Trust.

A. Substantive Consolidation.

The debtor/appellants argue that the Bankruptcy Court, "in effect sanctioned the substantive consolidation of Twin Development with the Debtors" [appellants' brief at 14]. That is not correct.

Substantive consolidation is an equitable doctrine, available under Section 105 of the Bankruptcy Code, under which, "the assets and liabilities of different entities may be consolidated and dealt with as if the assets were held by, and the liabilities were incurred by, a single entity". 5 *Collier*

on *Bankruptcy* ¶1100.06[1] at 1100-32 (15th ed. 1985). The Bank's Plan provided for the substantive consolidation of the five debtors, but never purported to make Twin liable for the obligations of the debtors. Instead, the Bank's Plan did what the debtors' plans had proposed to do, and what the creditors themselves could have ultimately done in the absence of the bankruptcies—the Bank's Plan provided that Twin's share of the Washington Proceeds would be used to pay creditors.

The appellants have already attacked substantive consolidation on appeal, and have lost that appeal [Dbt. App. 399-404]. District Judge Aronovitz “studiously examined” that issue, and concluded that substantive consolidation, “was proper and correct as a matter of law and was based on sufficient factual findings which were not, themselves, clearly erroneous” [*Id.*]. That opinion characterizes the evidence in the record justifying substantive consolidation as “strong and convincing” [Dbt. App. 401]. The Order affirming substantive consolidation is “law of the case”, and may not be attacked again by the debtor/appellants in the District Court. *Hildreth v. Union News Co.*, 315 F.2d 548, 550 (6th Cir. 1963); *Dade County Classroom Teachers' Ass'n. v. Rubin*, 238 So.2d 284, 289 (Fla. 1970), *cert. den.*, 400 U.S. 1009, 91 S.Ct. 569, 27 L.Ed.2d 623 (1971).

The debtor/appellants have noted in their brief that substantive consolidation is, “one of the issues on appeal to the Eleventh Circuit”,⁷ so it is doubtful that this Court can even consider the issue.

Twin was not “substantively consolidated” with the debtors. Twin's obligation and liability to pay its share of the Washington Proceeds to Holywell—expressly and repeatedly admitted by the debtors—was a property right of Holywell's. When the Plan was consummated on October 10,

⁷Appellants' initial brief at page 15, note 7.

1985, the Liquidating Trustee acquired and utilized that property right.

The creditors of debtors Gould, Holywell, MCLP, and Chopin could have reached Twin's share of the Washington Proceeds. Under Section 620.63, Fla.Stat., Gould was personally liable to all creditors of MCLP and of Chopin, as well as to all of his own creditors.⁸ All such creditors—MCLP's Chopin's, and Gould's—could have levied or executed upon his 100% ownership interest in Holywell. In turn, all of those creditors *and* all of Holywell's creditors could have levied or executed upon Holywell's 100% ownership interest in Twin, which included the \$13.1 million portion of the Washington Proceeds. Thus, the provisions of the Bank's Plan and the actions of the Liquidating Trustee were entirely consistent with Florida's creditors' rights law, and did not prejudice Twin. The appellants argue that the use of Twin's funds "would be grossly unfair to Twin's creditors and equity holders", but of course:

(a) The appellants lack standing to complain about hypothetical or supposed injuries to creditors that are not before this Court. [Dbt. App. 406; *R.T. Vanderbilt Co. v. OSHA Rev. Comm.*, 708 F.2d 570, 574 (11th Cir. 1983)]; and

(b) The only "equity holder" of Twin is debtor/appellant Holywell, which has already taken and lost an appeal from the confirmation and operation of the Bank's Plan.

All of the "substantive consolidation" cases raised by the appellants were taken into account by District Judge Aronovitz in approving the confirmation of the Plan. A case-by-case analysis of the authorities cited by the appellants

⁸Because Gould was a general partner of debtors MCLP and Chopin, which are both Florida partnerships.

would serve no purpose here, because they are the same authorities that have been cited (a) by the debtors in their unsuccessful appeal from the order of substantive consolidation and from the Confirmation Order, (b) by District Judge Aronovitz in approving substantive consolidation and the other aspects of the Bank's Plan attacked by the debtors, and (c) by the debtors in their further appeal from Judge Aronovitz's Order to the Eleventh Circuit. In addition, the Plan's use of Twin's portion of the Washington Proceeds did not amount to "substantive consolidation" as argued by the debtors. Twin's existence as a corporation, its other assets, and all of its liabilities were unaffected by the Plan. Only the funds that "had" to be dividended to Holywell⁹ and that were part of the Bank's cash collateral were affected by the Plan. That is far short of "substantive consolidation".

B. The Guarantees and Stock Pledge.

The appellants next argue that their own guarantees and Holywell's pledge of Twin's stock to the Bank, "did not mean [the Bank] could simply grab the Twin assets" [appellant's initial brief at 26].

The Bank did not "grab the Twin assets". Twin's share of the Washington Proceeds has been applied to pay the Gould Group's creditors, which is a result that the creditors could have obtained by execution against Gould and Holywell. The Bank's Plan did precisely what the debtors repeatedly proposed to do—it used the Washington Proceeds to pay the Gould Group's creditors. The cash collateral Order [Dbt. App. 77] brought Twin's portion of the Washington Proceeds under the jurisdiction of the Bankruptcy Court. If Twin had an objection to that result (which Twin plainly did not, since it was controlled by Holywell and Gould and neither appealed the Order), it was required to file an appeal on or before

⁹See the testimony of appellant Gould at page 12 of this brief.

January 10, 1985. Bankruptcy Rule 8002. Twin failed to do so, and thereby abandoned any right to dispute the Bankruptcy Court's jurisdiction over Twin's share of the Washington Proceeds or to claim that the debtors had no control over those funds.

II. This Appeal Is Moot.

In the absence of an order staying the implementation of a plan of reorganization or disposition of property, an appeal becomes moot. *In re Cada Investments, Inc.*, 664 F.2d 1158, 1160 (9th Cir. 1981). The same is true with respect to an unstayed appeal from a plan that has been substantially consummated. *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981).¹⁰ The Bank's Plan has been substantially consummated as defined by 11 U.S.C. §1101(2), as specifically determined by the Bankruptcy Court [Dbt. App. 367-68, Paragraph 57], and as admitted in open court by appellant Gould himself [Bank's App. 1]. There is simply no way that the Liquidating Trustee can identify Twin's portion of the Washington Proceeds or reclaim it from the creditors who were paid over the past year (consummation of the Plan began over a year ago, on October 10, 1985). Nor can Twin simply recover its \$13 million and walk away into the sunset, as the appellants apparently hope and urge.¹¹ The use of that money by the debtors was a material aspect of the Bank's Plan. The Bank would not have (a) released its lien over that

¹⁰See also *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986). That opinion notes that the failure to obtain a stay is fatal, "to the extent reversal of the confirmation order would require the invalidation of good faith transfers." *Id.* at 1147.

¹¹Such a result would allow over \$13 million to leave the five estates out a "side door" before all creditors were paid and the five cases closed. Because of Gould's direct and complete control over Twin, he would in effect receive the \$13 million as an equity distribution before payment of all creditors.

cash and the balance of the Bank's cash collateral, (b) waived the default interest differential on its construction loans to the debtors (several million dollars), or (c) bought the Miami Center Project for \$255.6 million, including approximately \$14 million of *new* cash, if Twin's funds had been unavailable as a matter of law for the payment of other creditors. Since the sale closed on October 10, 1985 and Twin's portion of the Washington Proceeds was turned over to the Liquidating Trustee as of that date pursuant to the terms of the Plan and of that sale, it is now too late to unwind the transaction. *In re Matos*, 790 F.2d 864 (11th Cir. 1986); *In re Sewanee Land, Coal & Cattle Co., Inc.*, 735 F.2d 1294 (11th Cir. 1984).

Mootness is jurisdictional, and this appeal should be dismissed on that basis. *Locke v. Board of Public Instruction of Palm Beach County*, 499 F.2d 359, 363-64 (5th Cir. 1974).

CONCLUSION

Having lost a direct attack on the Bank's Plan in this Court [Dbt. App. 387], the debtors are now attempting to raise an argument on behalf of one of their many wholly-owned and totally-controlled subsidiaries [Bank's App. 2]. For their own purposes, the debtors repeatedly represented that Twin's share of the Washington Proceeds were available to Holywell and for the payment of the Gould Group's creditors. In seeking permission to sell the Washington, D.C. properties that generated Twin's cash, the appellants told the Bankruptcy Court that "the immediate cash infusion" would inure to their benefit and would be "an essential part of the reorganization" [Dbt. App. 3].

Now the appellants want to argue that Twin was outside the sphere of the bankruptcies, and that the Bankruptcy Court and the Bank's Plan could not deal with Twin's share of the Washington Proceeds, even though those funds "had"

to be paid to Holywell [see Mr. Gould's testimony at page 12 of this brief].

The Bankruptcy Court correctly rejected that transparent change in position by the debtors. Moreover, District Judge Aronovitz has already heard and rejected the appellants' objections to the Bank's Plan; this appeal is merely another bite at the apple. Accordingly, it is respectfully submitted that this Court should dismiss this appeal as moot or, in the alternative, affirm the Bankruptcy Court's Order below.

Respectfully submitted,

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By: /s/ [illegible], for
Vance E. Salter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Dismiss Appeals as Moot was furnished by overnight courier this 7th day of November, 1986 to Fred H. Kent, Jr., Esq., Kent, Watts & Durden, 1400 Florida National Bank Tower, 225 Water Street, Florida 32202, and Raymond Bergan, Esq., Williams & Connolly, 839 Seventeenth Street N.W., Washington, D.C., 20006, as attorneys for appellants; and by messenger to Irving M. Wolff, Esq., Holland & Knight, 1200 Brickell Avenue, Miami, Florida 33131, as attorney for the Liquidating Trustee.

/s/ [illegible], for

Vance E. Salter

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
Case No. 84-01591-BKC-TCB
Case No. 84-01592-BKC-TCB
Case No. 84-01593-BKC-TCB
Case No. 84-01594-BKC-TCB
Chapter 11

IN RE: HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, and THEODORE B. GOULD,
Debtors,

ORDER ON REMAND

The District Court Order of Remand dated December 30 reached this court on January 6 (C. P. No. 1145). It requires that one or more hearings be held, proposed findings and conclusions be entertained, and that this court not later than January 29:

“make and enter such findings of fact and conclusions of law as are necessary to provide the District Court with an adequate basis to decide the . . . appeal on the merits.”

At a conference held January 14, the debtor requested and on January 18 the court held an evidentiary hearing to receive additional evidence on three issues: (a) the value of the Miami Center Project, (b) the value to the estate of a lawsuit pending before Judge Hoeveler, and (c) amount of the Bank's lien. The parties also re-

requested leave to submit their proposed findings and conclusions by January 23. The parties agreed that no other hearings were necessary.

Although counsel for MCJV and O&Y attended both hearings, neither they nor any party other than the debtors and the Bank participated.

On January 23, both the debtors (C. P. No. 1175) and the Bank (C. P. No. 1176) submitted comprehensive and detailed proposed findings and conclusions, respectively 43 and 52 pages in length.¹ In addition, the debtors filed on January 28 the debtors' 22-page response to the Bank's proposed findings and conclusions.

I presume counsel understand what will best assist Judge Aronovitz. Recognizing the weight accorded to adopted findings, *Anderson v. Bessemer City*, 470 U.S. —, 84 L.Ed.2d 518, 527 (1985), I have used the time available to me to review carefully the proposed findings and conclusions and the debtors' Response together with the entire record, instead of attempting to reword and retype forty to fifty pages of similar detail. For the most part the facts flow from uncontroverted matters of record. The parties differ in the emphasis they give and the inferences they draw from the undisputed events.

I reject the proposals of the debtors as reflecting in essential respects the contentions I considered and rejected previously. I adopt the Bank's proposed findings of fact and conclusions of law, copies of which are attached and incorporated in this Order. They accurately represent my own considered conclusions as to both the facts and legal principles implicit in the Confirmation Order of August 8, 1985 (C. P. No. 906) and the earlier

¹ Official Form 31, prescribed by the Judicial Conference pursuant to Bankruptcy Rule 9009 as the form for a chapter 11 Order Confirming Plan, is a page and a half and contains only the eight statutory requirements of 11 U.S.C. § 1129(a) rephrased as mixed

* * * *

Consolidation Order (C. P. No. 840). The earlier order followed one session of the extended confirmation hearing and resolved one bitterly contested element of the confirmation issues. It was not possible, in this case, to hear all the issues and parties during one uninterrupted session.

In a matter of this magnitude, fought as hard as this one has been, it is easy to lose sight of the forest while concentrating on the trees. Neither this review, the additional evidence tendered, nor the subsequent events have caused me to recede from the decisions I reached after spending a year with all the parties and the issues they presented, which I attempted to put into perspective in the Confirmation Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND

Findings of Fact

A. *Parties*

1. The debtors are Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, a Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

2. The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Pavillon Hotel, retail space between them known as the "Podium",

and an adjoining parking garage (collectively, the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

3. Miami Center Joint Venture ("MCJV") is a Florida general partnership formed by debtor Gould and Olympia & York Florida Equity Corp. ("O&Y"), a Florida corporation established by a large Canadian real estate development company. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the Phase I Project. Gould and O&Y originally planned to construct Phases II and III of Miami Center on those lots, but disputes and litigation between the two partners prevented any such construction.

4. Holywell Leasing Company ("HLC") and Holywell Telecommunications Company ("HTC") are two of numerous non-debtor subsidiaries wholly owned by debtor Holywell (wholly owned, in turn, by Gould). Gould was president of each at all material times.

5. Over 400 other creditors have an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by this Court, and have been active, for the Holywell, MCLP, and MCC estates.

B. Jurisdiction

6. This Court has jurisdiction over these reorganization proceedings and over the parties pursuant to 28 U.S.C. § 157, the standing order of reference in this District, and the Order of Remand.

C. The Debtors' Plans

7. The debtors filed a separate, amended disclosure statement and plan for each estate; however, all were

nearly identical in form and substance [C.P. No. 466-470].

8. The debtors' plans were predicated upon:

(a) the sale of the Miami Center Project to Hadid Investment Group, Inc. ("Hadid") for \$260 million;

(b) the payment of undisputed claims from approximately \$32 million realized by Holywell, a wholly-owned subsidiary, and Gould in January, 1985 from the sale of other real estate in the Washington, D.C. area (by Order entered December 31, 1984, C.P. No. 303, such funds were determined to be cash collateral under 11 U.S.C. § 363, subject to the Bank's first lien) ;

(c) the pursuit in the District Court of a lawsuit against the Bank and its participating lenders (*Miami Center Limited Partnership, et al. v. The Bank of New York, et al.*, Case No. 85-0228-Civ-Hoeveler; the "District Court Action") for alleged fraud, usury, breach of contract, and civil claims under the federal RICO act; and

(d) equitable subordination of the Bank's construction loan and mortgages under 11 U.S.C. § 510(c).

D. *Objections to the Debtors' Plans*

9. Objections to the debtors' amended plans were filed by:

(a) O&Y [C.P. No. 533], upon the grounds that:

(1) the debtors' plans were based on a "wholly speculative agreement" with Hadid, "replete with holes and contingencies";

(2) O&Y and MCJV, "would be subjected to continuing delays, mounting costs and interest charges", and:

The past record of the Debtors, and notably of Mr. Gould as the controlling and dominating person, is replete with evidence of unfounded representations,

commitments and undertakings breached, and a myriad of obligations, assurances and agreements unfulfilled and repudiated. The record in these very proceedings, reflect the repeated experiences of partners and creditors with such abandoned commitments and undertakings.

[*Id.*, Paragraph 3];

(3) "Gould, as proponent of the Debtors' consolidated plans, in light of his loss of credit and credibility in the real estate and financial markets, is perhaps the least likely prospect to achieve a prompt sale and disposition of the properties concerned and a discharge of the claims of creditors." [*Id.*, Paragraph 5];

(4) the debtors' plans classified the O&Y claims "in a separate and subordinate class", below those of other unsecured creditors;

(5) the debtors' plans lacked "sufficient funds . . . to provide for the repayment of all of [O&Y's] claims";

(6) the debtors' plans failed to provide for the discharge of the claims of O&Y under two agreements covering certain furniture, fixtures and equipment (the "FF&E"); and

(7) the debtors' plans failed to provide for the payment of debtor Holywell's liability, "to MCJV and [O&Y] of an amount of approximately \$1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation" [*Id.*, Paragraphs 13 and 14].

(b) the Bank [C.P. No. 535], upon the grounds that:

(1) the debtors' plans were misleading, and were based upon contingencies unlikely to materialize and requiring years of litigation to resolve;

(2) the debtors' plans failed to meet the "best interest of creditors" (Section 1129(a)(7)), feasibility (Section 1129(a)(11)), and "cram down" (Section 1129(b)(1)) requirements under the Code; and

(3) the debtors' "equitable subordination proposal in respect to the Bank's liens was moot in light of this Court's March 20, 1985 decision [C.P. No. 20 in Adv. Pro. No. 85-0160-BKC-TCB-A] holding that two releases executed by the debtors in favor of the Bank and its participating lenders) barred the debtors' claims of wrongdoing.

(c) the MCC and MCLP Creditors' Committees [C.P. No. 567], upon the grounds that:

(1) the debtors' plans were not feasible, because the Hadid contract was "not a true and valid offer";

(2) the matter of equitable subordination of the Bank's claim had been adjudicated against the debtors;

(3) the debtors' plans would eliminate the estates' equity because of the accrual of interest on the Bank's mortgages during the litigation and the Hadid contract delays;

(4) the debtors' plans unfairly discriminated against creditors and were not fair and equitable;

(5) the debtors failed to comply with 11 U.S.C. § 1129 (a) (5) (A) (i); and

(6) the debtors made solicitations of creditors through improper "telephone calls and a mailgram, which did not truthfully represent the facts", attempting in bad faith to obtain acceptances, in contravention of 11 U.S.C. § 1126(e).

(d) Julian J. Studley, Inc. [C.P. No. 526], an unsecured creditor, because of the improper classification of its claims and failure to comply with 11 U.S.C. § 1123 (a) (4).

(e) the Holywell Creditors' Committee [C.P. No. 516], upon the following grounds:

(1) the "illusory" nature of the debtors' plans because, "they do not present a binding contract with a purchaser,

but represent merely an option to a real estate broker which can be extended through September, 1985, under the Contract", and the "down payment" was merely a promissory note; and

(2) the debtors' plans would entail substantial delays because of (i) the "study period" and extensions under the Hadid contract and (ii) the litigation involved in the attempt to subordinate the Bank's claims.

E. The Bank's Plan

10. The Bank filed an amended, consolidated disclosure statement and plan [C.P. No. 478] which was further amended [C.P. No. 854] during the course of the confirmation proceedings. The Bank also entered into certain stipulations with the Creditors' Committees [C.P. No. 564, 614, 709c, and 876a]. Neither the stipulations nor the second amendment to the Bank's plan adversely affected any party other than the Bank.

11. The central features of the Bank's amended, consolidated plan are:

(a) the purchase by the Bank (or its designee) of the Miami Center Project, including the FF&E, for its MAI-appraised value of \$255.6 million, comprised of (i) satisfaction of the Bank's judgment lien, computing interest at the contract or "good standing" rate rather than the higher default rate, and (ii) the balance, after closing adjustments and prorations, in new cash;

(b) the establishment of the "Miami Center Liquidating Trust", consisting of all other assets of the debtors, for the payment of all other claims by a court-appointed Liquidating Trustee;

(c) the release by the Bank of its cash collateral (approximately \$30 million), for addition to the new cash generated by the sale of the Miami Center Project (approximately \$13.6 million), with the combined funds to

be used by the Liquidating Trustee to pay the claims of all other creditors;

(d) a further financing commitment of approximately \$14.4 million by the Bank for payment of the claim of MCJV for the FF&E, (i) if and when such claim is allowed over the Bank's pending objections, (ii) to the extent other assets of the Liquidating Trust prove insufficient to pay the claim, and (iii) if it is ultimately determined that MCJV has been damaged by its (allegedly) improper classification under the Bank's plan;

(e) dismissal of the District Court Action by the Liquidating Trustee; and

(f) the consolidation of all five estates in a manner such that the unaffiliated creditors of Holywell are paid first, the unaffiliated creditors of the other debtors are paid next, and the many inter-debtor and related party claims are paid thereafter.

F. Objections to the Bank's plan

12. Objections to the Bank's Plan were filed by:

(a) the Holywell Creditors' Committee [C.P. No. 515], but these objections were subsequently withdrawn by stipulation [C.P. No. 614, paragraph 6];

(b) O&Y [C.P. No. 532, 817a, 871], upon the grounds that:

(1) the Bank's plan assumes title to the MCJV FF&E without adequate and priority payment of sums allegedly due under the FF&E agreements; and

(2) the Bank's plan, "fails to provide for payment of Gould's and Holywell Corporation's obligations to O&Y through MCJV of an amount of approximately \$1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation . . .".

(c) Shutts & Bowen, a creditor and law firm representing the debtors [C.P. No. 537a], upon the grounds that:

(1) the Bank's plan is "unfairly discriminatory and is not fair and equitable" to impaired classes;

(2) the Bank's valuation of assets and claims is erroneous;

(3) the Bank's plan assumes liabilities of MCJV;

(4) the Liquidating Trust is violative of 11 U.S.C. § 1129(5)(A)(i); and

(5) the plan's priority scheme does not comply with 11 U.S.C. § 1129.

(d) MCJV [C.P. No. 808], though comprised of Gould and O&Y, in separate objections alleging that the plan fails to provide proper payment and priority for the MCJV FF&E claims.

(e) the debtors [C.P. No. 534, 545, 580, 849, and 888a], upon the grounds that:

(1) the Bank's plan fails to pay in full for the FF&E;

(2) the Bank's plan deprives mechanics' lien claimants of their security;

(3) the Bank's plan and disclosure statement are misleading;

(4) substantive consolidation would only result in "unjust enrichment" to the Bank and other creditors;

(5) the Bank's plan would cause the limited partners to lose their investment and to become liable for additional taxes;

(6) the District Court Action would be "summarily" dismissed, "without due process of law"; and

(7) the appointment of a Liquidating Trustee violates 11 U.S.C. § 1104(a).

G. Voting by the Creditors

13. After the debtors' and the Bank's disclosure statements were approved, and pursuant to this Court's order

[C.P. No. 405], separate ballots for the debtors' plans and for the Bank's plan were transmitted to all creditors for return by April 29, 1985. On that date, the Court held an initial confirmation hearing and, with the assistance of counsel, established a procedure for the tabulation of the ballots and for certification by the plan proponents of the availability of all funds necessary for consummation should a plan be confirmed [C.P. No. 611, 612, 619].

14. The requisite certificates respecting the voting and the funding were filed by each side on May 13, 1985, as directed [C.P. No. 658-664], and were reviewed by the Court.

15. The voting indicated overwhelming support for the Bank's plan among the creditors, and rejection of the debtors' plans. Creditors in Classes 1 through 6 approved the Bank's plan by well over the minimum margins required (one-half in number and two-thirds in dollar amount, per 11 U.S.C. § 1126(c)). However, O&Y and MCJV (Class 7 under the Bank's plan), certain wholly-owned subsidiaries of Holywell controlled by Gould (Class 8), and the debtors themselves (Class 9), voted against the Bank's plan. Accordingly, the Court was required to determine whether the plan met the requirements of 11 U.S.C. § 1129(b).

H. *Establishment of the Bank's Lien*

16. In order to establish the amount, validity, and priority of its lien over the debtors' property, the Bank filed an adversary proceeding against the debtors (Adv. Pro.No. 85-0160-BKC-TCB-A).

17. The debtors sought a stay of the scheduled trial of the lien proceeding (a) initially in the Bankruptcy Court [C.P. No. 3A in Adv.Pro. 85-0160], and (b) then in the District Court Action. Both Courts refused to enter such a stay, and the trial went forward as scheduled.

18. That proceeding culminated in the entry by this Court of:

(a) a final judgment in favor of the Bank for principal and interest of \$234,342,742.93, plus interest of over \$75,000 per day from March 14, 1985, forward [C.P. No. 21 in Adv.Pro. 85-0160]; and

(b) a memorandum decision upholding the two releases executed by the debtors in favor of the Bank (and its participating lenders), and determining that those releases barred the fraud, breach of contract, usury, and RICO theories raised by the debtors as purported defenses in this Court and as claims in the District Court Action [C.P. No. 20 in Adv.Pro. 85-0160].

At the remand hearing on January 18, 1986, the debtors presented evidence which purported to show a discrepancy in the amount of the Bank's lien. However, since that amount has been embodied in a final judgment [C.P. No. 21 in Adv. Pro. 85-0160] that is now on appeal before the District Court (*Gould et al. v. The Bank of New York, Case No. 85-2263-Civ-NCR*), the Court will not revisit that issue. The Court has also been directed to the debtors' brief in that appeal which states, at page 23, that the debtors, "do not contest that the principal amount advanced by The Bank of New York is \$196,711,481.58", exactly the amount set forth in the final judgment [transcript of hearing of January 18, 1986, page 11].

I. *The FF&E Leases*

19. Next, as part of the continuing confirmation process, the parties advised the Court that characterization of two agreements, relating to the FF&E and between MCJV and MCLP (debtor Gould was managing general partner of each), as "true leases" or as "financing agreements" could be dispositive of the FF&E claims asserted by O&Y and MCJV. The Bank filed [Adv.Pro.No. 85-0566-BKC-TCB-A] an adversary proceeding against the affected parties seeking a determination of the nature (secured

or unsecured), extent, and value of such claims. The Bank also filed an objection to the FF&E claim filed by O&Y and MCJV [C.P. No. 811], which remains pending.

20. After an evidentiary hearing, the Court entered an extensive memorandum opinion [C.P. No. 26 in Adv. Pro. 85-0566] holding that the two agreements were "true leases" (and, therefore, that MCJV owned the FF&E subject to debtor MCLP's option rights under the leases). The Court was not asked to, and did not, determine in that proceeding the priority of MCJV's claim or the proper amount of that claim assuming exercise of MCLP's option to acquire the FF&E (as provided by the Bank's plan).

J. Substantive Consolidation

21. Thereafter, the parties furthered the confirmation process by noticing an evidentiary hearing upon the debtors' objections to the substantive consolidation feature of the Bank's plan. Both sides presented evidence and argument [C.P. No. 844] on the issue.

22. The Court determined, based upon facts and authorities detailed below (Paragraphs 29-41 and 58-67), that substantive consolidation is in the best interest of creditors, is not prejudicial to the debtors, and is appropriate on the record before the Court [Consolidation Order, C.P. No. 840]. Under the plan, the creditors have received or will receive more than they would in liquidation. 11 U.S.C. § 1129(a) (7).

K. Further Hearings

23. During the confirmation process (April 29 through August 8, 1985), the Court held numerous other hearings and invited counsel to submit such memoranda and request such hearings as they might deem appropriate or necessary to supplement the already-voluminous record before the Court. During that time, no further evidentiary hearings were requested.

24. However, pursuant to the Order of Remand and the written request of counsel for the debtors, a further evidentiary hearing was conducted on January 18, 1986, for the submission of evidence regarding:

- (a) the value of the Miami Center Project;
- (b) the value or "cost/benefit" of the District Court Action; and
- (c) the calculation of the Bank's lien.

L. *Findings As to the Debtors' Plans*

25. At the instance of the Bank, the deposition of the President of Hadid Investment Group, Inc. (the proposed purchaser of the Miami Center Project for \$260 million under the terms of the debtors' plans), Mohammed A. Hadid, was taken on April 19, 1985 [C.P. No. 649]. Hadid's testimony and the deposition exhibits demonstrate, and the Court finds, that:

- (a) the Hadid contract had no fixed closing date, and was little more than an open-ended option;
- (b) Hadid was still searching for a principal to finance or acquire the Project under the contract, and did not have the wherewithal independently to close the purchase;
- (c) Hadid and any such principal would not deal with the Project until the "cloud of bankruptcy" was removed; and
- (d) the "down payment" was a mere promissory note of dubious enforceability.

26. As is evident from the results of the voting (see Paragraphs 14 and 15, *supra*), numerous classes of creditors voted against the debtors' plans.

27. The "equitable subordination" of the Bank's judgment, as proposed by the debtors, would not have been permitted because the debtors had specifically released any

and all such claims against the Bank and its participating lenders [C.P. No. 20 in Adv.Pro. 85-0160].

28. The debtors' numerous disputes and litigation on nearly every front—with the IRS, the City of Miami, the *ad valorem* tax authorities, the general contractor, the debtors' former lawyers, the former hotel operator (Trusthouse Forte), O&Y, the leasing agent (Julian J. Studley, Inc.), prospective tenants, and the Bank—would have continued or even increased under the debtors' plans, such that the funds of the estates otherwise available for the payment of claims to creditors would have been substantially eroded by legal fees and other costs of litigation. All such litigation is detailed in the debtors' amended schedules [C.P. No. 275-278] and disclosure statements [C.P. No. 377-381]. It is likely that consummation of the debtors' plans would have been followed by liquidation or by a need to further reorganize. 11 U.S.C. § 1129(a) (11).

M. Findings on Substantive Consolidation As Proposed by the Bank's Plan.

29. All of the Creditors' Committees supported substantive consolidation. No creditor (except for those controlled by Gould) objected to substantive consolidation.

30. Gould's testimony at deposition, to which the Court was directed at the hearing on substantive consolidation [C.P. No. 385h], was:

Q: Is it fair for us to conclude that Holywell, the parent company, is the ultimate beneficiary of any and all profits that these companies make?

A: [Mr. Gould]: Yes, it is. [Page 31].

* * *

Q: Has it been customary for these interrelated companies to move money back and forth?

A: Yes. [Page 202].

* * *

Q: Did either of these two corporations operate at a profit?

A: All of them did.

Q: All of that money was dividended up to Holywell?

A: Yes.

Q: Then you, as the sole stockholder in Holywell, got a dividend from Holywell?

A: No. All the funds during the past four years have been loaned to this project.

Q: Holywell—

A: All of the funds that Holywell has earned during the past four years have been loaned to the Miami Center Limited Partnership. [Page 55].

Moreover, the debtors specifically asked the Court to approve (and the Court did approve) as undisputed liabilities of the debtors, payments to terminated employees of Holywell's wholly-owned subsidiaries: Parkwell, Inc.; Parkwell of Florida; Holywell Construction Co.; Holywell Telecommunications Co.; Florida Viking Properties; Orion Engineering Services; Whitehall Building Services; Whitehall Security Corp.; and Holywell Hotels, Inc. [C.P. No. 609, Exhibit "B"]. All such employees performed services for the Miami Center Project owned by debtors MCLP and Chopin.

31. The debtors' schedules [C.P. No. 275-278] show, and the debtors have never disputed that:

(a) Gould owns 100% of debtor Holywell;

(b) Gould is jointly and severally liable for all of the debts of debtor MCLP and of debtor Chopin because he is a general partner of each (Sections 620.62 and 620.625, Florida Statutes);

(c) Holywell owns 100% of debtor MCC and of Holywell's numerous other subsidiaries; and

(d) MCC is also jointly and severally liable for all debts of MCLP and Chopin, because MCC is a general partner of each.

32. The debtors' outside accountant testified, and the Court thus finds, that Holywell's financial statements were consolidated with those of debtor MCC [C.P. No. 844, pages 37-38].

33. The debtors cross-guaranteed each other's liabilities to the Bank and to various other creditors. Many creditors filed claims against the wrong debtor or debtors as a result. For example:

(a) Holywell Construction Company, a wholly-owned subsidiary of debtor Holywell, was "an agent of [debtor] Miami Center Limited Partnership" [C.P. No. 788, page 37; see also page 100].

(b) Holywell Real Estate Corporation, another of the many wholly-owned subsidiaries of debtor Holywell, entered into a contract for work at Miami Center that was always to be paid by debtor MCLP [Id. at page 45; the Court held debtor Holywell liable].

(c) The State of Florida, Department of Labor, believed its claims were against "Holywell Hotels, Inc., trading as Pavillon Hotel", rather than against debtor Holywell [Id. at page 99].

(d) Debtor MCLP acknowledged indebtedness for purchases made by Whitehall Security Corporation, another wholly-owned subsidiary of debtor Holywell [Id. at page 104].

(e) Debtor Holywell furnished credit information in support of credit extended for purchases by debtor MCLP, and was invoiced for those purchases [Id. at 123-29].

(f) A Miami law firm invoiced debtor Holywell for services allegedly obtained for debtor MCLP, apparently by Holywell Construction Company [Id. at 147-49].

34. The creditors filed overlapping claims because of their confusion. The debtors objected to over 300 claims on the grounds that the claims were filed against the wrong debtors [C.P. No. 577-579, 584-86, 588, 589].

35. The schedules claim the following inter-company indebtedness, among others, between various debtors and their wholly-owned subsidiaries:

(a) MCLP owes Holywell \$4,080,395.21.

(b) MCLP owes Holywell's wholly-owned subsidiary "Charleston Center Corp." \$2,067,801.71.

(c) MCLP owes debtor Chopin \$11,528,389.33.

(d) MCLP owes Holywell's wholly-owned subsidiary "Holywell Construction Co." \$500,832.12.

(e) MCLP owes Holywell's wholly-owned subsidiary "Holywell Hotels, Inc." \$1,923,862.81.

(f) MCLP owes Holywell's wholly-owned subsidiary "Holywell Management Co." \$222,004.55.

(g) MCLP owes Holywell's wholly-owned subsidiary HTC \$64,489.59.

(h) MCLP owes Holywell's wholly-owned subsidiary "Orion of Washington" \$499,333.00.

(i) MCLP owes Holywell's wholly-owned subsidiary "Orion Engineering Services" \$275,704.74.

(j) MCLP owes Holywell's wholly-owned subsidiary "Parkwell, Inc." \$114,249.21.

(k) MCLP owes Holywell's wholly-owned subsidiary "PBA Architects, Inc." \$856,709.17.

(l) MCLP owes Holywell's wholly-owned subsidiary "Pietro Belluschi, Inc." \$300,833.

(m) MCLP owes Gould \$2,215,539.09.

(n) MCLP owes Holywell's wholly-owned subsidiary "Whitehall Building Services, Inc." \$26,385.47.

(o) MCLP owes Holywell's wholly-owned subsidiary "Whitehall Security Corp." \$1,543,938.86.

(p) Gould owes Holywell \$1,750,000 plus interest.

(q) Holywell is owed the following by its wholly-owned subsidiaries:

Charleston Center Corp.	\$1,814,066.09
PBA, Inc.	1,201,578.97
TBG Institute	1,199.00
Parkwell of Florida	1,937.54
Whitehall Security Corp.	2,535.35
Whitehall Building Services, Inc.	7,617.15
Orion Engineering	3,359.28
Holywell Management	59,724.88
Racing Club	82,597.81
Holywell Hotels, Inc.	5,000.00
Holywell Trading	834.35
Holywell Real Estate	137,784.49
Holywell Telecommunications Co.	471,115.39
Holywell Insurance Company	10,541.46
Studley/Holywell Associates, Inc.	30,493.08

36. The foregoing intercompany indebtedness exceeds \$31,800,000. Since Gould controlled both the purported obligor and the obligee with respect to each such liability, and since he admitted on deposition that he advanced all of the income from all of the debtors through Holywell to assist with MCLP's development of the Miami Center Project [See Paragraph 30, *supra*], such advances cannot be characterized at arms'-length or as founded upon adequate consideration.

37. Exhibit 4, Question 19b, in Holywell's Statement of Financial Affairs [C.P. No. 275] indicates that Gould paid himself (because he owned and controlled Holywell) \$1,051,844.67 from debtor Holywell's cash during the 11-

month period before the bankruptcy, and that Holywell made a loan of \$1,750,000 to Gould on October 14, 1983. During the hearing on this issue on July 18, 1985, Holywell's chief financial officer conceded [C.P. No. 844, page 57, lines 19-24] that the Holywell-Gould loans were not evidenced by a written note. Schedule B-2 to the Statement of Financial Affairs shows that Holywell owned 100% of 19 different subsidiaries (only one, MCC, is a debtor), and that 14 of those subsidiaries allegedly owed money (about \$3.8 million) to Holywell.

38. MCLP's Statement of Financial Affairs [C.P. No. 276] also reflects numerous inter-debtor transactions and debts (most are summarized at Paragraph 35, *supra*). MCLP, though admittedly in default under its loans with the Bank at the time, paid Holywell over \$1.2 million [*Id.*, Exhibit 13(a)] in the seven months preceding the bankruptcies.

39. MCC's schedules [C.P. No. 277, Schedule B-2] show that Holywell owed MCC \$898,779, and that MCC (wholly owned by Holywell) owned a 47.88% partnership interest in MCLP and a 64% partnership interest in debtor Chopin. The schedules also confirm [Schedule A-2] that MCC is liable as a general partner for the debts of MCLP and of Chopin.

40. Gould's schedules [C.P. No. 278, Schedule A-1] show claims against him by the IRS of over \$2.5 million because (a) Gould was an officer of debtor Holywell's wholly-owned subsidiaries Holywell Construction Company and Holywell Hotels, Inc., and (b) he failed to cause those entities to pay federal withholding taxes. The schedules also admit [Schedule A-2] Gould's liability as general partner for MCLP's debts (other than any non-recourse mortgages) and for Chopin's debts. Finally, Gould listed ownership [Schedule B-2] of 17% of MCLP and 36% of Chopin.

41. Thus, debtor Gould owned all of debtor Holywell, which in turn owned all of debtor MCC. Gould therefore

owned, directly or indirectly through Holywell and MCC, general and limited partnership interests constituting 64.88% of MCLP and 100% of Chopin. The debtors have never disputed that Gould personally controlled all five of the co-debtors.

N. *Findings on Classification Under the Bank's Plan*

42. The objections relating to the classification structure of the Bank's plan came only from entities which Gould controlled (MCJV, of which he was "managing venturer" and general partner, and HTC and HLC, of which he was president—and which he owned through his 100% ownership of Holywell), or with whom he was a partner (O&Y and the minority limited partners of MCLP).

43. The claims of MCJV and O&Y were classified as "Class 7" under the Bank's plan, junior in priority of distribution to the claims of general unsecured creditors that were not affiliated with Gould (Class 6). The MCJV and O&Y claims are not substantially similar to the claims of those unaffiliated creditors, because;

(a) Any distribution to MCJV increases the value of debtor Gould's 50% equity in MCJV;

(b) MCJV has recourse to Gould's equity interest in MCJV's valuable real estate, while the unaffiliated unsecured creditors have no such recourse (the MAI appraisal filed by the debtors indicated that the four unimproved parcels owned by MCJV were worth \$104 million [C.P. No. 149, Exhibit "C"; also of record at C.P. No. 822, Exhibit "A"], while the liabilities of MCJV have been represented to be approximately \$60 million;

(c) the MCJV claim was asserted by a purported creditor (MCJV) controlled by a debtor (not the case for any Class 6 creditor); and

(d) similarly, O&Y stands to realize 50% of any distribution to MCJV, and has recourse against Gould's

50% equity in MCJV, for O&Y's claims against the debtors.

44. Similarly, the claims of HTC and HLC (each wholly owned by debtor Holywell and controlled by Gould), assigned to Class 8, are substantially dissimilar to the claims of the unaffiliated, Class 6 unsecured creditors. 100% of any payment to HTC or HLC directly benefits (and is readily available to) debtors Holywell and Gould. Payments to unaffiliated creditors, on the other hand, do not result in any other direct or indirect benefit to any debtor.

45. The limited partners of MCLP hold equity interests rather than claims, and were assigned to Class 9. Such interests are not substantially similar to the claims of any of the senior classes under the Bank's plan.

O. Findings on Equitable Subordination

46. The entities affiliated with Gould and objecting to classification junior to the claims of general unsecured creditors have consistently maintained that this Court lacked a sufficient factual basis to equitably subordinate such claims. The Order of Remand directed the Court to enter detailed findings on the issue. As the conclusions of law demonstrate (see Paragraphs 68-74, *infra*), the Court approved the junior classification accorded such claims by the Bank's plan because the Court found that those claims were not substantially similar to the claims of the senior classes (as specified by 11 U.S.C. § 1122) that had no such affiliation with the debtors.

47. So that the record is clear, however, the factual prerequisites for equitable subordination of the MCJV, O&Y, HTC, and HLC claims are also established by the record. Gould engaged in inequitable conduct, including:

(a) The payment of enormous sums of money to himself (see Paragraph 37, *supra*), at a time when he was refusing to pay numerous unaffiliated creditors of all of the debtors;

(b) conflicts of interest resulting from his control of both lessor and lessee under the MCJV-MCLP FF&E agreements, the HTC-MCLP FF&E agreement, the HLC-MCLP FF&E agreement, and the Chopin-MCLP ground lease; and

(c) his failure to pay withholding taxes for Holywell Hotels, Inc. and Holywell Construction Company (see Paragraph 40, *supra*), with the result that his estate was charged for the \$2.5 million in penalties under 26 U.S.C. § 6672, to the detriment of creditors.

48. Gould's misconduct injured his creditors and, but for the substantive consolidation of the five estates and junior classification of the related-party claims as provided by the Bank's plan, Gould's inter-company liabilities would have permitted Gould, and non-debtor entities controlled by him, to receive distributions from the "cash-rich" estates (the Gould and Holywell estates, if contingent liabilities are disregarded), while unaffiliated creditors of the cash-poor estates (principally MCLP) would have received dividends (if any) amounting to less than full payment of their claims. All such misconduct is imputed as a matter of law to the entities for which Gould acted (see Paragraph 62(a) in the Conclusions of Law which follow).

P. Valuation of the Project

49. Prior to confirmation, no party or attorney for a party requested a valuation hearing. The Court had before it the following evidence as to the value of the Miami Center Project:

(a) the debtors' appraisal [C.P. No. 392], setting the value of the Project at \$260.5 million (land and buildings) plus \$14.5 million (FF&E) as of October 1, 1984;

(b) the Hadid contract [Exhibit "A" to C.P. No. 378] of February 11, 1985, for a gross purchase price of \$260 million, apparently exclusive of the FF&E;

(c) the liquidation values assigned to the property by the debtors in their disclosure statements: \$210 million for the structures [Exhibit "E" to C.P. No. 378] and \$23.4 million for the underlying land [Exhibit "E" to C.P. No. 380], or a total of \$233.4 million without the FF&E; and

(d) the Bank's appraisal [C.P. No. 479, 796], setting the value of the Project including the FF&E at \$255.6 million as of November 15, 1984.

50. Upon remand, the parties presented the testimony of their respective appraisers. Each appraiser adhered to his prior estimate of value [transcript of hearing of January 18, 1986 (not yet docketed), pages 62-108].

51. Upon the record before the Court prior to confirmation, the Court found that the Bank's proposed purchase price of \$255.6 million, including the FF&E, was fair and equitable, and considerably in excess of the liquidation value of the Project as computed by the debtors. The Bank's offer was the only firm offer available, and had the added benefit of releasing over \$30 million of the Bank's cash collateral for the payment of other creditors. In the Confirmation Order of August 8, 1985, this Court noted:

The debtor's major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

The absence of offers in excess of the Bank's proposal is significant. The Bank's purchase price and MAI appraisal (\$255.6 million, including FF&E) are between

the debtors' liquidation estimate (\$233.4 million, without FF&E) and the debtors' MAI appraisal (\$260.5 million without FF&E, or \$275 million with FF&E). The two appraisers agree that the income approach to value should be given the greatest weight. The debtors' appraisal computed a value of \$267 million under that approach [C.P. No. 392, page 99], while the Bank's appraiser's comparable estimate was \$255.6 million. The difference between the values, less than 5%, apparently occurred because the debtors used estimated taxes and assessments of \$4 million per year, while the Bank's appraiser used the actual taxes and assessments imposed by Dade County and the City of Miami (approximately \$5.2 million per year) [transcript of hearing of January 18, 1986 (not yet docketed), page 91].

52. The Court has not been presented with any new evidence upon remand that would alter the findings in the Confirmation Order. The evidence upon remand does, however, make it clear that the debtors are taking inconsistent positions for purposes of these proceedings on the one hand and Dade County property tax proceedings on the other. The County appraised the facilities at \$183.7 million in 1984, while the debtors' "good faith estimate" of value for the Project was only \$87 million [see Exhibit "A" to C.P. No. 491, "Debtors' Emergency Motion for Authorization to Pay Good Faith Deposit on 1984 Dade County, Florida Real Estate Taxes", also marked as Exhibit "D" at the hearing of January 18, 1985].

53. Based upon all of the foregoing, the Court finds that the \$255.6 million purchase price offered by the Bank for the Project (including the FF&E) is fair and equitable, and is in the best interest of the creditors. The Court further finds that the Bank is a good faith purchaser.

Q. District Court Action

54. In the Confirmation Order, the Court noted the litigiousness of the parties:

If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The District Court Action is an illustration of that point. In the memorandum decision respecting the releases signed by each of the debtors [C.P. No. 20 in Adv.Pro. 85-0160], this Court held that the releases barred both future and existing claims relating to the transactions between the debtors and the Bank. Notwithstanding the releases and this Court's ruling on the releases, however, the debtors continued to maintain the District Court Action.

55. It is not surprising that the Bank required dismissal of the District Court Action as a condition to close the purchase under its Plan. It would make little sense for the Bank to invest new money, discharge its judgment lien, and release millions of dollars of cash collateral, only to remain exposed to continuing litigation costs (probably unrecoverable from the debtors). In light of the releases, no significant value can be assigned to the District Court Action; to the contrary, the continuance of the suit is a significant detriment because of the first-priority attorneys' fees that would have to be incurred to do so.

56. This analysis was confirmed upon remand by the expert testimony of a seasoned, local trial lawyer (and former Florida Circuit Court Judge), presented by the

Bank upon remand [transcript of hearing of January 18, 1986 (not yet docketed), pages 34-39]. I find that the District Court Action has no significant value to the debtors.

R. *Consummation of the Bank's Plan*

57. The Court has now also had the unusual opportunity to observe the substantial consummation of the plan under evaluation (after the debtors failed to post the appeal bond upon which a stay was conditioned). The fairness, feasibility, and propriety of the plan have been verified by the following, and propriety of the plan have been verified by the following, as reported by the parties and the Liquidating Trustee:

(a) all Class 1 administrative claims have been paid or reserved for;

(b) the Project was sold on October 10, 1985, resulting in the satisfaction in full of the claim of the Class 2 creditor (the Bank) and the termination of interest (accruing at over \$2 million per month) and negative cash flow from operations;

(c) the Class 3 creditor has been paid in full;

(d) Undisputed claims in Classes 4 through 6 have been paid in full, and funds have been reserved for all disputed claims;

(e) several disputed claims have been compromised, saving the estates millions of dollars as against the amount claimed; and

(f) there remain sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (although the exact amount cannot yet be determined because so many of the claims are unliquidated).

No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liqui-

dating Trustee, and the debtors were discharged under Code Section 1141. It is now legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the status quo before confirmation.

Conclusions of Law

S. Substantive Consolidation

58. Substantive consolidation, derived from this Court's general equitable powers under 11 U.S.C. § 105, is a case-by-case inquiry. 5 *Collier on Bankruptcy*, ¶ 1100.06 at 1100-33 (15th ed.). In substantive consolidation cases, "the relationship between entities with respect to which consolidation is sought is far more important than the nature of such entities". *Id.* Thus it is not significant that the debtors sought to be consolidated are an individual, two partnerships, and two corporations.

59. Certain objective criteria should be considered in evaluating whether substantive consolidation is warranted:

(a) The presence or absence of consolidated financial statements;

(b) The unity of interests and ownership between various corporate entities;

(c) The existence of parent and intercorporate guarantees on loans;

(d) The degree of difficulty in segregating and ascertaining individual assets and liabilities;

(e) The existence of transfers of assets without formal observance of corporate formalities;

(f) The commingling of assets and business function; and

(g) The profitability of consolidation at a single physical location.

In Re Donut Queen, Ltd., 41 B.R. 706, 709 (Bkcty., E.D.N.Y. 1984).

60. However, "there is no one set of elements which, if established, will mandate consolidation in every instance." *In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bkcty., D. Mass. 1982). Instead, "the enumerated factors should be evaluated within the larger context of balancing the prejudice resulting from the proposed order of consolidation with the prejudice the moving creditor alleges it suffers from debtor separateness". *In re Donut Queen, supra*, at 709-10.

61. The Court also may approve substantive consolidation when the expense and difficulty of determining intercompany claims, liabilities, and ownership of assets is substantial. *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d. Cir. 1966); *In re Nite Lite Inns*, 17 B.R. 367, 371 (Bkcty. S.D. Cal. 1982).

62. On the facts established here (Paragraphs 29 through 41, above), substantive consolidation is appropriate. Because of controlling provisions of Florida law relating to creditors' rights, substantive consolidation under the Bank's plan here does little more than to adopt and implement state law. For example:

(a) In due course, a creditor of MCLP could reach (i) Gould's assets (because of his liability as a general partner), (ii) MCC's assets (because of MCC's role as a general partner), (iii) Holywell's assets (net of its liabilities), by levying upon Gould's ownership of 100% of the stock of Holywell, and (iv) Chopin's assets (net of its liabilities), since it is owned 36% by Gould and 64% by MCC. The pertinent provisions of Florida's partnership laws are:

(1) *620.62 Partnership bound by partner's wrongful act.* When loss or injury is caused to a partner in the partnership . . . the partnership is liable for it to the same extent as the partner so acting or omitting to act.

(2) *620.625 Partnership bound by partner's breach of trust.* The partnership is bound to make good the loss:

(i) When one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(ii) When the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by a partner while it is in the custody of the partnership.

(3) *620.63 Nature of partner's liability.* All partners are liable:

(i) Jointly and severally for everything chargeable to the partnership under §§ 620.62 and 620.625.

(b) The foregoing statutes, which extend to breaches of contract by Gould, also make MCLP and Chopin responsible for any liabilities of Gould incurred in connection with the Miami Center Project.

(c) Similarly, a creditor of Holywell ultimately could reach (i) MCC's assets (net of its liabilities), because MCC is 100% owned by Holywell, (ii) MCC's ownership, in turn, of 47.88% of MCLP and 64% of Chopin, (iii) Gould to the extent he acted as director or president of Holywell to misapply Holywell's funds (see Paragraph 37, above), and (iv) MCLP because of Holywell's alleged ownership of a claim for over \$4 million against MCLP (see Paragraph 35(a), above).

(d) Finally, creditors of MCC and Chopin eventually could reach those debtors' partnership interests in MCLP

and therefore the net assets of MCLP itself (under Sections 620.62 and 620.625, Florida Statutes, *supra*), and a creditor of Chopin could reach the assets of both MCC and Gould (because each is a general partner of Chopin).

63. The Court found [C.P. No. 844, page 97], that the alternative to substantive consolidation, "would appear to be an unnecessarily circuitous, time-consuming, and expensive exercise that might conceivably lead to the diversion of some assets which, under the principles of law as I understand them, ought to be available for the satisfaction of these obligations". In short, if the creditors of the five separate estates seek to assert their claims against the primary obligors, the other estates which have contingent or secondary liability under Florida law for those claims may be closed (and any residue diverted or misapplied) before the primarily liable estate is exhausted. Substantive consolidation avoids the unfairness inherent in such a result.

64. Analyzing the seven factors enumerated in *In re Donut Queen*, *supra*, the Court concludes that:

(a) Consolidated financial statements were prepared as to Holywell, MCC, and MCC's interests in Chopin and MCLP (see Paragraphs 32 and 39, *supra*). In addition, even the debtors' bi-weekly debtor-in-possession reports were prepared on a consolidated basis during the period before confirmation [see, for example, C.P. No. 423].

(b) There is a single common element of interest, control, and ownership of all five debtors: Theodore B. Gould.

(c) The debtors' schedules reflect numerous cross-guaranties of loans and other obligations of the debtors. In particular, all five debtors guaranteed all of the Bank's advances to MCLP and to Chopin (totalling over \$240 million in principal and interest).

(d) The inter-company debts, in excess of \$31.8 million, would require substantial accounting and legal expenditures to investigate and adjust. The costs of such an investigation would delay payments to unaffiliated creditors and would reduce the amount available to pay creditors. In light of the joint and several liability of several of the debtors under Florida law, such expenditures are not warranted.

(e) Gould operated the debtors without regard to their separate identities. He caused Holywell, for example, to advance \$1.75 million to him without the formality of even a promissory note (see Paragraph 37, *supra*). He testified to numerous pre-petition transfers among the debtors and their affiliates [C.P. No. 385h, page 202].

(f) Business functions and assets were commingled. Certain debtors regularly paid obligations and performed services for other debtors and their affiliates, instead of letting the beneficiary pay or perform directly [C.P. No. 385h, pages 45, 55, 67-69, 141].

(g) The debtors can operate (and are operating) successfully at a single location. Having announced an intention to leave Miami, the debtors' single office is now in Charlottesville, Virginia [C.P. No. 844, page 50].

65. Each of the seven factors supports substantive consolidation in this case. Moreover, there is no prejudice to the creditors. The creditors did not object to substantive consolidation, and the Creditors' Committees supported that aspect of the Bank's plan.

66. The debtors have claimed prejudice, but have not proven it. At the hearing on July 18, 1985 [C.P. No. 844, page 68], the debtors indicated no objection to consolidation except in the case of Holywell's consolidation with MCLP:

[The Court]: . . . if the—well, let me ask a preliminary question—the nub here, the serious problem

and the only serious problem, I take it, that the debtor has with consolidation is the attempted consolidation of Holywell and MCLP?

[Debtors' Counsel]: That's correct, and Holywell is the one objecting.

The debtors never demonstrated prejudice as an unavoidable consequence of substantive consolidation. There has been no evidence to substantiate the debtors' claim that substantive consolidation will somehow cost them "approximately \$17 million in Federal income taxes" [C.P. No. 580, page 2].

67. Based upon all of these factors and the authorities previously cited, and in the exercise of its equitable powers under Code Section 105(a), the Court finds that substantive consolidation in the minimal form proposed by the Bank is equitable, is in the best interest of the creditors, and (because of the substantial unity of ownership interests in all five debtors in Gould) does not unfairly prejudice the debtors. As provided by the Bank's plan, each debtor will retain its individual name, form of organization, and the right to continue business, after discharge. The debtors will not disappear in a merger-like consolidation as is sometimes sought in such cases. The Bank's plan does require that each debtor's assets be exposed to the claims of creditors of all of the related estates, however, so the Bank has labelled that aspect of its plan as "substantive consolidation." The Court finds that the Bank has accepted and satisfied its burden under applicable precedent. The Court does not believe that the hundreds of creditors involved here should be required to engage in a shell game or to have to guess which debtor is most likely to be able to pay. Many of the creditors are not represented by counsel and apparently are not even aware that they have claims against several of the estates under Florida law, rather than just the single estate of the primary obligor. The need for credi-

tors to file such claims and to trace assets is completely attributable to the labyrinth that Gould has created. Consolidation here will not make any debtor pay any creditor unless that debtor or one of its secondarily-liable co-debtors (principally Gould) was legally responsible for the claim involved.

T. *Classification*

68. Section 1122(a) of the Code directs that, with a single exception not applicable here, "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."

69. The creditors that have objected to a junior classification hold claims that are markedly dissimilar, both as to the ultimate effect of payment of the claim and as to the special property held by the claimant (see Paragraphs 42 through 45 above). In the case of MCJV:

(a) Payment of MCJV's claim will benefit debtor Gould's 50% equity interest in MCJV by 50% of the payment. MCJV's claim is in essence a hybrid of debt (to the extent that O&Y, a non-debtor is benefitted) and equity (to the extent that a debtor, Gould, is benefitted).

(b) MCJV's claim can readily be satisfied from special property (the four downtown lots, appraised at \$104 million) held by MCJV and not directly available to satisfy the claims of creditors that are not affiliated with Gould. MCJV's claim can be satisfied by merely reducing Gould's equity interest in, and other claims against, MCJV. Under the equitable principle of marshalling, MCJV may be required to look first to a source of recovery unavailable to other competing creditors. *In re All American Holding Corp.*, 10 B.R. 71, 73 (Bkcty. S.D. Fla. 1981), *aff'd* 17 B.R. 926, 928-29 (S.D. Fla. 1982). *Matter of Emerald Hills Country Club*, 32 B.R. 408, 421-22 (Bkcty. S.D. Fla. 1983).

70. In the case of HTC and HLC, both are wholly-owned subsidiaries of a debtor and are completely controlled by Gould. It would be inequitable to permit such claimants to share ratably with unaffiliated unsecured creditors. To do so here would be to violate the absolute priority rule by permitting a debtor and its equity interests to share equally and in parity with an unsecured creditor. In view of Gould's undisputed control of these claimants, they were properly classified below the general unsecured creditors.

71. In the case of O&Y, the marshalling analysis set forth above is also applicable. As the only other general partner of MCJV, O&Y has access to a special source of recovery (Gould's ownership interest in MCJV) that is unavailable to other creditors. Additionally, any payment to O&Y reduces O&Y's parallel claim against MCJV in the remanded arbitration proceedings now pending between O&Y and Gould, thereby increasing Gould's 50% equity interest. By reducing the aggregate liabilities of MCJV, any such payment benefits Gould by an amount equal to 50% of the payment. That is not the case with respect to payments made by the debtors to unaffiliated creditors. The Court also notes that the debtors' plans [C.P. No. 466-70] classified O&Y separately, based upon the fact that O&Y has recourse to the MCJV property. The debtors' plans contemplated that O&Y would not be paid until (a) the arbitration and litigation between O&Y and Gould reached an end and (b) MCJV sold a substantial part of its real estate.

72 Each of these objecting affiliated creditors is an "insider" under 11 U.S.C. § 101(28)(A) (subparagraph (ii), as to MCJV; subparagraph (iii), as to O&Y; and subparagraph (iv) as to HTC and HLC). On facts similar to those here it has been held that an insider may not, "share the same priority with general unsecured creditors of the Debtor". *In re Economy Cast Stone Co.*, 16 B.R. 647, 651 (Bkcty. E.D. Va. 1981); *In re Toy &*

Sports Warehouse, 37 B.R. 141 at 152 (Bkcty. S.D.N.Y. 1984)

73. The debtors' proposed plans also accorded a junior priority to the claims of "affiliated Creditors", defined to include entities "in which the Debtor owns an equity interest", thereby assigning a junior classification to the claims of MCJV, HTC, and HLC [C.P. No. 466-470, Exhibit "A", pages 1-2].

74. The unaffiliated creditors would not likely have accepted a plan which gave higher or equal dignity to the claims of Gould-controlled equities. The claims of the Gould-controlled entities are not "substantially similar", either legally or in practical effect, to the claims of the unaffiliated creditors assigned separate and senior classes by the Bank's plan. Accordingly, the Bank's classification structure complies with 11 U.S.C. § 1122(a).

U. *Equitable Subordination*

75. Based upon the Court's findings with respect to Gould's conduct (Paragraphs 46-48), the Court concludes that equitable subordination under Sections 510(c) of the Code and the tripartite test of *Mobile Steel Co.*, 563 F.2d 692, 700 (5th Cir. 1977), is warranted. The claims of MCJV, O&Y, HTC, and HLC warrant equitable subordination because Gould's misconduct, and the attendant prejudice to other creditors, is imputed to those claimants as a matter of Florida partnership law and the law of agency. MCJV and O&Y themselves alleged such misconduct in their objections to the debtors' plans (Paragraph 9(a)(2), 9(a)(7), above). On the record here, Gould will not be permitted by this Court to receive distributions before, or even on a parity with, the unsecured creditors.

V. *District Court Action*

76. The Court has performed the "cost/benefit" analysis of the District Court Action, as suggested by the

debtors. *Matter of Jackson Brewing Co.*, 624 F.2d 599 (5th Cir. 1980); *TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 20 L.Ed. 2d 1, 88 S. Ct. 1157 (1968).

77. The Court concludes (see Paragraphs 54-56) that the claims asserted in the District Court Action are barred (a) by the releases executed by the debtors and (b) by this Court's memorandum decision [C.P. No. 20 in Adv. Pro. 85-6160], which bars re-litigation of the release issue. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984). Based upon that conclusion and the testimony of the only expert witness to address the matter, the District Court Action is not worth the cost of prosecution.

78. The Bank's plan and the Liquidating Trustee may lawfully dismiss the District Court Action. The District Court Action is an asset of the debtors' estates subject to the jurisdiction of this Court. 11 U.S.C. § 541(a)(1); *In re AutoWest, Inc.*, 43 B.R. 761, 763 (D. Utah 1984). The Bank's plan provided that ownership of the District Court Action passed to the Liquidating Trustee, who thereby acquired the power to pursue, abandon, or compromise the claims. 11 U.S.C. § 1141(c). This Court has not in any way encroached upon the jurisdiction of the District Court. Ownership of the District Court Action passed to the Liquidating Trustee when the debtors failed to stay consummation, and the Liquidating Trustee has stipulated to dismissal of the lawsuit. In doing so, the Liquidating Trustee was performing a condition precedent to the realization of significant benefits for the estates—the closing of the sale of the Project, the resultant infusion of millions of dollars of new cash, and the release of over \$30 million of the Bank's cash collateral.

W. Confirmation Requirements

79. The parties' certificates on the voting [C.P. No. 658-64] were verified by the Clerk's office.

80. The debtors' plan failed to receive acceptance under 11 U.S.C. § 1126(c). I also conclude that the debtors' plans were not feasible because of the delays and contingencies inherent in both the Hadid contract and the attempt to subordinate the Bank's \$240 million claim. Finally, the debtors' plans cannot be confirmed because of the Court's finding (Paragraph 28) that consummation likely would have been followed by liquidation or the need for further financial reorganization. 11 U.S.C. § 1129(a) (11).

81. The stipulations [C.P. No. 564, 614, 709c, and 876a] and second amendment [C.P. No. 854] did not adversely affect any party other than the Bank, and therefore did not require a supplemental disclosure statement or hearing for purposes of Code Section 1127. The Bank's plan as so amended was accepted by the requisite number of creditors in Classes 1 through 6. (Paragraph 15; 11 U.S.C. § 1126(c)). The Gould-affiliated Classes (7 through 9) rejected the Bank's plan.

82. The Bank's plan does not discriminate unfairly, and is fair and equitable with respect to each of the three classes that did not accept it. The Bank's plan complies with Sections 1129(a) and (b) of the Code:

(a) The Bank's plan complies with the applicable provisions of Chapter 11 of the Code.

(b) The Bank, as proponent of its plan, has also complied with applicable provisions of Chapter 11.

(c) The Bank's plan has been proposed by the Bank in good faith, and not by any means forbidden by law.

(d) Any payments made or promised by the Bank for services or for costs and expenses in, or in connection with, the case, or in connection with the plan and incident to the case, have been disclosed to the Court; there are no such payments to be made before confirmation; and each such payment to be fixed after confirmation is subject to the approval of this Court as reasonable.

(e) The Bank has disclosed the identity and affiliations of the Liquidating Trustee, and the Trustee's appointment and continuance in office are consistent with the interests of the creditors and equity interest holders, and with public policy. Section 1142 of the Code specifically contemplates the possibility that a liquidating trust and trustee may be the entities designated by a plan to carry out the plan after confirmation. Further, the Bank has disclosed the identity of any insider that will be employed by or retained by the reorganized debtors, and the nature of any compensation for such insider.

(f) There are no regulatory commissions with jurisdiction (for purposes of Section 1129(a)(6)).

(g) With respect to each impaired class of claims or interests, (1) each holder of a claim or interest of such class has (A) accepted the Bank's plan or (B) will receive or retain under the plan on account of such claim or interest property of a value, as of the "Effective Date", that is not less than the amount such holder would receive or retain in liquidation, or (2) if Code Section 1111(b)(2) applies to the claims of such class, each such holder will receive or retain on account of such claim property of a value, as of the Effective Date, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims. Under the Bank's plan, all mechanics' lienors are paid in full, so the debtors' objections regarding the priority of such liens are moot.

(h) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Bank's plan provides that: (1) with respect to a claim of a kind specified in Sections 507(a)(1) or 507(a)(2) of the Code, on the Effective Date, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim; (2) with respect to a class of claims of a kind specified in Sections

507(a) (3), 507(a) (4), or 507(a) (5) of the Code, each holder of a claim of such class will receive, if such class has accepted the Bank's plan, deferred cash payments of a value, as of the Effective Date, equal to the allowed amount of such claim (or, if such class has not accepted the plan, cash on the Effective Date equal to the allowed amount of such claim); and (3) with respect to a claim of a kind specified in Section 507(a) (6) of the Code, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding 6 years after the date of assessment of such claim, of a value, as of the Effective Date, equal to the allowed amount of such claim.

(i) At least one class of claims has accepted the Bank's plan, determined without including any acceptance of the plan by an insider holding a claim of such class.

(j) Confirmation of the Bank's plan is not likely to be followed by the liquidation, or the need for further financial reorganization, or the debtors or any successors to the debtors under the Bank's plan, except to the extent that liquidation or reorganization is proposed by the plan.

(k) With respect to the impaired classes and creditors that rejected the Bank's plan (MCJV, O&Y, the debtors, and the debtors' affiliates) and the requirement of Code Sections 1129(a) (8) and 1129(b), the Bank's plan does not discriminate unfairly and is fair and equitable with respect to each such impaired class of claims:

(1) Each holder of an impaired secured claim has retained the lien securing such claim, to the extent of the allowed amount of such claim, and will receive on account of the claim deferred cash payments totalling at least the allowed amount of the claim and of a value, as of the Effective Date, of at least the value of such holder's interest in the debtors' interest in such property.

(2) (A) Each holder of an impaired unsecured claim has received or retained on account of such claim property of a value, as of the Effective Date, equal to the allowed amount of such claim, or (B) the holder of any claim or interest junior to the claims of such impaired, unsecured class will not receive or retain any property on account of that junior claim or interest.

(3) (A) Each holder of an interest will receive or retain on account of such interest property of a value, as of the Effective Date, equal to the value of such interest (no such holder is entitled to a fixed liquidation preference or fixed redemption price, so far as the record reflects), or (B) the holder of any interest junior to the interests of such class will not receive or retain any property on account of that junior interest. The priority of distribution to Holywell creditors pursuant to stipulation does not adversely affect any equally-situated creditors, since all creditors through Class 6 will be paid in full. Accordingly, the Bank's plan was and is entitled to confirmation.

In accordance with the Order of Remand, the foregoing findings of fact and conclusions of law are hereby incorporated within, and made a part of, the Confirmation Order, *nunc pro tunc*.

DONE AND ORDERED at Miami, Florida, this 29th day of January, 1986.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

See attached service list.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CIVIL ACTION NO.

TWIN DEVELOPMENT CORPORATION,

Plaintiff

v.

FRED STANTON SMITH, BANK OF NEW YORK,
and IRVING WOLFF,

Defendants

COMPLAINT
AND APPLICATION FOR PRELIMINARY
AND PERMANENT INJUNCTION

1. This is a civil action seeking declaratory, injunctive, and equitable relief, and damages. Plaintiff is a Virginia stock corporation with its principal place of business in Albemarle County, Virginia. Defendant Bank of New York is a corporation incorporated under the laws of the State of New York, with its principal place of business in the City of New York, and also doing business in Miami, Florida. Defendant Fred Stanton Smith is an individual citizen and resident of Miami, Florida. Defendant Irving Wolff is an individual citizen and resident of Miami, Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00. Jurisdiction is based on 28 U.S.C. 1332.

2. Holywell Corporation, the sole record shareholder of Twin Development Corporation, also has its sole place of business in Albemarle County, Virginia.

3. On June 23, 1983, in accordance with the provisions of an assignment and security agreement, Holywell Corporation pledged to Bank of New York, as collateral for a loan by the Bank of New York to Chopin Associates and Miami Center Limited Partnership, all the shares of stock of Twin Development Corporation, as well as the shares of stock of other subsidiary corporations owned by Holywell Corporation (the "other subsidiaries"). By the terms of the agreement, Bank of New York's lien on the shares of stock of Twin Development Corporation and the other subsidiaries was to be extinguished upon the repayment of the loan.

4. Holywell Corporation subsequently transferred physical possession of the certificates representing all of the shares of stock of Twin Development Corporation and the other subsidiaries to Bank of New York.

5. On August 22, 1984, Holywell Corporation, Chopin Associates, Miami Center Limited Partnership, Miami Center Corporation and Theodore B. Gould filed related Chapter 11 petitions for reorganization with the United States Bankruptcy Court for the Southern District of Florida.

6. On August 8, 1985, the said Bankruptcy Court confirmed a Plan of Reorganization for the filed Debtors which provided for the appointment of a liquidating trustee (not a Bankruptcy Trustee, as defined in the United States Bankruptcy Code) to convey certain improved real property in Miami, Florida, to the Bank of New York, or its nominee, for a price of \$255,600,000.00; said conveyance would result in satisfaction of the Debtors' indebtedness to the Bank of New York and the extinguishing of the above-mentioned liens on the stock of Twin Development Corporation and the other subsidiaries, all of which were non-filed, solvent corporations.

7. The said Bankruptcy Court appointed Fred Stanton Smith as the liquidating trustee and appointed Irving Wolff, Esquire, as the attorney for the liquidating trustee.

8. On October 10, 1985, Fred Stanton Smith, the liquidating trustee and one of the Defendants herein, conveyed the above-mentioned real property to the nominee of the Bank of New York, resulting in satisfaction of the Debtors' indebtedness to the Bank of New York.

9. Upon the transfer of the above-mentioned Miami real property to the nominee of the Bank of New York, the Bank of New York delivered to the said Irving Wolff, then attorney for the liquidating trustee, the certificates representing all of the shares of stock of Twin Development Corporation and the other subsidiaries, inasmuch as the conveyance of the Miami real property had released the Bank of New York's lien on the said shares of stock.

10. On May 15, 1987, the aforementioned Bankruptcy Court dismissed Irving Wolff as attorney for the liquidating trustee, and appointed Herbert Stettin, Esquire, as the new attorney for the liquidating trustee Fred Stanton Smith.

11. Defendant Fred Stanton Smith now asserts, through his new attorney Herbert Stettin, that the shares of stock of Twin Development Corporation and the other non-filed subsidiaries, and, through these shares, all of the assets, real and personal, of Twin Development Corporation and the other subsidiaries—all solvent corporations that were never under the jurisdiction of the Bankruptcy Court and never part of the Debtors' bankrupt estates—are the property of the liquidating trustee, who, not being a Bankruptcy Trustee, is not an officer of the court.

12. Defendant Fred Stanton Smith, through his new attorney Herbert Stettin, threatens to act by voting the shares of stock of Twin Development corporation and the other subsidiaries so as to create new Boards of Directors which will authorize the liquidation of Twin Development Corporation and the other subsidiaries, and the transfer of

the proceeds from such liquidations into the liquidating trust controlled by Defendant Smith.

13. Under the Bankruptcy Code, the ownership of the stock of Twin Development Corporation and the other subsidiaries reverted to Holywell Corporation, outside the jurisdiction of the Bankruptcy Court, upon confirmation of the Plan of Reorganization entered on August 8, 1985.

14. Defendant Bank of New York wrongfully transferred the certificates representing the shares of Twin Development Corporation and the other subsidiaries to Defendant Irving Wolff, who was then attorney for the liquidating trustee, on October 10, 1985.

15. Defendant Fred Stanton Smith now wrongfully asserts that the shares of stock of Twin Development Corporation and the other subsidiaries are the property of the liquidating trustee, and threatens to immediately vote the said shares of stock so as to cause an immediate liquidation of Twin Development Corporation and the other subsidiaries, and the transfer of the proceeds of said liquidations into an account controlled by the liquidating trustee, Defendant Smith.

16. A liquidating trustee not appointed as a Bankruptcy Trustee under 11 U.S.C. 1104, but purporting to exercise the sweeping powers reflected in the allegations herein, is not authorized by the Bankruptcy Code.

17. The actions of the Defendants as set forth above represent part and parcel of a continuous pattern of conduct in which the liquidating trustee, to the extent of the validity of his appointment (which appears to be directly contrary to the provisions of the Bankruptcy Code), has disregarded the legitimate interests of the Plaintiff and the other subsidiaries of Holywell Corporation, said entities being solvent, non-

debtor corporations, and has breached his fiduciary duty to them as beneficiaries of the liquidating trust, causing substantial damage to the Plaintiff and the other subsidiaries. The said conduct of the Trustee has included, without limitation:

- a. Failure and refusal to establish any reserve for the repayment to plaintiff of a super-priority loan approved by and ordered by the Bankruptcy Court to be paid with priority over all other creditors.
- b. Failure and refusal to establish any reserve for the satisfaction of income tax liabilities of Plaintiff and the other non-debtor subsidiaries of Holywell Corporation, incurred as a result of the sale of assets of Plaintiff and the other non-debtor subsidiaries, a significant portion of the proceeds from such sales currently being in the possession of the liquidating trustee.

18. The wrongful actions of Defendant Bank of New York and Defendant Fred Stanton Smith, and the immediately threatened actions of Defendant Smith will, if unchecked, cause immediate irreparable harm to Plaintiff Twin Development Corporation, for which there is no immediately available adequate remedy at law.

WHEREFORE, Plaintiff Twin Development Corporation prays for the following:

1. A hearing on the corporation's application for a preliminary injunction enjoining Defendants Bank of New York, Irving Wolff, and Fred Stanton Smith from taking any action whatsoever with respect to the said shares of stock and/or assets of Twin Development Corporation or the other subsidiaries, and particularly enjoining Defendant Fred Stanton Smith from any efforts to assert his claimed right

to vote the shares of stock of Twin Development Corporation or the other subsidiaries in any fashion whatsoever, pending trial of this matter.

2. Judgment requiring Defendant Irving Wolff or any successor holder to deliver to the lawful officers of the Plaintiff all certificates representing the shares of stock in Twin Development Corporation and the other subsidiaries now wrongfully held by him, and a permanent injunction forever enjoining Defendants, or any of them, from asserting any right or claim to the stock or assets of Twin Development Corporation or the other subsidiaries, or, alternatively, a hearing, pursuant to 28 USC 2201 for a determination and declaration of the identity of the proper shareholders of Twin Development Corporation and the other subsidiaries.

3. Inasmuch as this is an action to quiet title to property whose situs is in this district, an order of this court pursuant to 28 USC 1655, directing the out-of-state Defendants named herein, namely, Bank of New York, Irving Wolff, and Fred Stanton Smith, to appear or plead in this matter by a day certain (such order to be served personally on the Defendants).

4. For damages in excess of \$10,000.00.

5. And for such other and further relief as justice and equity may require.

Respectfully Submitted,

TWIN DEVELOPMENT CORPORATION

BY: /s/ Robert M. Musselman

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Attorneys for Plaintiffs

SECTION 105 (11 U.S.C. §105)

§ 105. Power of court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

* * *

SECTION 363 (11 U.S.C. §363)

§363. Use, sale, or lease of property.

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as

provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act (15 U.S.C. 18a) in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification, unless the court, after notice and hearing, orders otherwise.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203, or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (c) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners, and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or

financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

* * *

SECTION 541 (11 U.S.C. §541)

§541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date.

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor; or

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

* * *

Rule 7052.

FINDINGS BY THE COURT

Rule 52 F.R. Civ. P. applies in adversary proceedings.

* * *

Rule 9014.

CONTESTED MATTERS

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

* * *

**RULES OF CIVIL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS**

VI. TRIALS

Rule 52. Findings by the Court

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment

Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of

the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

3

NO. 88-80

Supreme Court, U.S.

FILED

AUG 15 1988

JOSEPH F. SPANIOL, JR.
CLERK

in the
Supreme Court
of the
United States of America

OCTOBER TERM, 1987

HOLYWELL CORPORATION and
THEODORE B. GOULD,

Petitioners,

vs.

FRED STANTON SMITH, Trustee
of the Miami Center Liquidating Trust, and
THE BANK OF NEW YORK,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

APPENDIX OF RESPONDENT,
THE BANK OF NEW YORK

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- App. B *In re Holywell Corp.*, Bkcty. Ct. Case Nos. 84-01590-BKC-TCB through 84-01594-BKC-TCB, Motion to Require Theodore B. Gould and/or Holywell Corporation to Cause all Funds Received by Related Entities in Connection With the Sale of Certain Real Property Pursuant to a Purchase Agreement Dated as of July 26, 1984, as Amended to be Deposited into a Segregated Account
- App. C *In re Holywell Corp.*, Bkcty. Ct. Case Nos. 84-01590-BKC-TCB through 84-01594-BKC-TCB, Emergency Motion to Treat Proceeds of the Sale of Certain Real and Personal Property as Cash Collateral, to Segregate and Account for Cash Collateral
- App. D *In re Holywell Corp.*, Bkcty. Ct. Case Nos. 84-01590-BKC-TCB through 84-01594-BKC-TCB, Response to Emergency Motion for Clarification and Motion for Order Directed to Theodore B. Gould to Show Cause Why He Should Not Be Cited for Civil Contempt (Exhibit 1 included, all other exhibits not referenced)
- App. E *In re Holywell Corp.*, Bkcty. Ct. Case Nos. 84-01590-BKC-TCB through 84-01594-BKC-TCB, Motion for Order Approving and Authorizing Holywell Corporation and Theodore B. Gould to Consummate the Sale of Certain Real and Personal Property (Exhibits not included)

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- App. H *In re Holywell Corp.*, Bkcty. Ct. Case Nos. 84-01590-BKC-TCB through 84-01594-BKC-TCB, Amended Consolidated Plan of Reorganization Proposed by The Bank of New York
- App. I *In re Holywell Corp.*, Bkcty. Ct. Case No. 84-01590-BKC-TCB Holywell Corporation's Report on Amounts to be Deposited Before Confirmation
- App. J *Olympia & York Florida Equity Corp. v. The Bank of New York*, Case No. 85-3230-CIV-ATKINS (S.D. Fla. March 24, 1987)
- App. K *Holywell Corp. v. The Bank of New York*, Case No. 86-0848-CIV-RYSKAMP, Answer Brief of Appellee, The Bank of New York
- App. L Excerpts from Rule 2004 Examination of Theodore B. Gould
- App. M *Holywell Corp. v. The Bank of New York*, Case No. 85-3225-CIV-ATKINS, Order of Remand and Denial of Motion to Dismiss (S.D. Fla. December 30, 1985)

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- App. N *In re Holywell Corp.*, Bkcty. Ct. Case Nos.
84-01590-BKC-TCB through 84-01594-BKC-TCB,
Liquidating Trustee's First Report in
Conjunction with Consummation of Confirmed
Plan of Reorganization
- App. O *In re Holywell Corp.*, Bkcty. Ct. Case Nos.
84-01590-BKC-TCB through 84-01594-BKC-TCB,
Order on Remand (S.D. Fla. January 29, 1986)
- App. P *In re Holywell Corp.*, Bkcty. Ct. Case No.
84-01594-BKC-TCB, Schedule A—Statement of
All Liabilities of Debtor



APPENDIX A
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

CASE NOS.

84-01590-BKC-TCB

84-01591-BKC-TCB

84-01592-BKC-TCB

84-01593-BKC-TCB

84-01594-BKC-TCB

ADV. NO. 85-0160-BKC-TCB-A

IN RE: HOLYWELL CORPORATION, et al.,
Debtors.

THE BANK OF NEW YORK,
a New York banking corporation,
Plaintiff,

vs.

THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership, and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and as general partner of MIAMI CENTER LIMITED PARTNERSHIP; and HOLYWELL CORPORATION, a Delaware corporation,

Defendants.

**JUDGMENT DETERMINING AMOUNT,
VALIDITY, AND EXTENT OF LIENS
OF THE BANK OF NEW YORK**

THIS CAUSE came to be heard on March 14, 1985 upon the Complaint of The Bank of New York (the "Bank") to determine the amount, validity, and extent of the Bank's mortgage liens. Having reviewed the pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§157(B)(2)(K) and 1334, and has jurisdiction over the parties.

2. The Bank is a New York banking corporation located in New York, New York, and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

3. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, a Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

4. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

5. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code on August 22, 1984.

6. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements and personal property on the real estate located in Miami, Dade County,

Florida ("Miami Center Phase I"), as described in the loan documents attached to the Bank's Complaint in this action.

7. The due execution, delivery, recording, and authenticity of the notes, mortgages, and other loan documents is not in dispute.

8. The Bank advanced to the Debtors under the terms of the notes and mortgages the sum of \$196,711,481.58, all of which is secured by the mortgages.

9. The Bank notified the Debtors by letter that the loans were in default at all times after January 31, 1984.

10. Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is \$33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at \$64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

11. Additional accrued interest on the loans, determined by the Bank, commenced February 1, 1984. That additional default interest of \$4,528,077.11 is payable to March 14, 1985, and is secured by the loan documents. Based on a prime rate of 10.5% such default interest will accrue in the additional amount of \$11,148.50 per day under the loan documents for each day from March 14, 1985 (for a total daily sum of \$75,320.16). Any change in the prime rate (whether up or down) will affect that daily interest figure.

12. The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses, totalling \$831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

13. The lien of The Bank of New York in and to the Debtors' real and personal property identified in the loan documents as against the Debtors is superior to any other

claim or interest of the Debtors in and to said real and personal property.

14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

15. The Court finds and decides that the total lien of the Bank (including default interest from February 1, 1984) is \$234,342,742.93 to March 14, 1985, plus per diem interest from March 14, 1985, at the rate of \$75,320.16 per day.

16. This Final Judgment is subject to the Court's Order, dated March 20, 1985, respecting the scope of the 1983 and 1984 releases executed by the Debtors.

DONE and ORDERED in Chambers at Miami, Florida, this 20th day of March, 1985.

/s/ Thomas C. Britton

UNITED STATES BANKRUPTCY
JUDGE

cc: S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.

APPENDIX B

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

Cases Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE:

HOLYWELL CORPORATION, et al.

Debtors.

**MOTION TO REQUIRE THEODORE B. GOULD AND/OR
HOLYWELL CORPORATION TO CAUSE ALL FUNDS
RECEIVED BY RELATED ENTITIES IN CONNECTION
WITH THE SALE OF CERTAIN REAL PROPERTY
PURSUANT TO A PURCHASE AGREEMENT DATED
AS OF JULY 26, 1984, AS AMENDED TO BE DEPOSITED
INTO A SEGREGATED ACCOUNT**

THE BANK OF NEW YORK ("BNY") a secured creditor respectfully moves this Court for an order directing Theodore B. Gould ("Gould") and/or Holywell Corporation ("Holywell") to cause all funds payable to related entities in connection with the sale of certain improved real property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group, Inc., as purchaser and Twin Development Corporation, 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Eleven Dupont Circle Associates and Dupont Land Associates as sellers (the "Purchase Agreement") to be deposited into a segregated account to be held subject to further order of this Court and as grounds therefor states:

1. The Bank of New York ("BNY"), a construction lender, from time to time since March 27, 1980 has made loans to Miami Center Limited Partnership ("MCLP") and Chopin Associates ("Chopin") in connection with the construction of the Miami Center Phase 1 project ("Phase 1"). The loan agreements entered into in March 1980 contemplated \$112,500,000 in loans to finance land acquisition and construction of Phase I. Due primarily to delays and hard and soft cost overruns the total costs far exceeded the original estimates and BNY, at the request of MCLP and Chopin, made additional loans. The unpaid principal amount of the indebtedness of Chopin and MCLP amounts including overdraft amounts is \$196,227,417.70 and interest is accruing thereon since December 1, 1983. The indebtedness due to BNY is secured, inter alia, by mortgages on Phase 1, by an assignment of all right, title and interest of Gould (or any entity in which Gould has or obtains an interest) to distributions as a general and/or limited partner from the Washington Properties, an assignment of all right, title and interest of Holywell including interests obtained as a result of any assignment or beneficial interest) to distributions as a general and/or limited partner from the sale of the Washington Properties, by a pledge of 100% of the issued and outstanding stock of Holywell, by a pledge of the stock of certain of Holywell's wholly owned subsidiaries, including without limitation, 100% of the issued and outstanding stock of Twin Development Corp. ("Twin"), 100% of the issued and outstanding stock of Orion Industries, Inc., 100% of the issued and outstanding stock of HWL Corporation and 100% of the issued and outstanding stock of Parkwell, Inc.

2. On August 22, 1984 Holywell, Gould and the other debtors herein, each filed a petition for reorganization under Chapter 11, Section 301 of the Bankruptcy Code (the "Code"). The within Chapter 11 cases are being jointly administered pursuant to Order of this court.

3. On October 22, 1984 this Court granted the motion of Holywell and Gould as partners and stockholders in Twin Development Corp., 1300 North 17th Street Associates, 1616 Reminic Limited Partnership, 11 Dupont Circle Associates and Dupont Land Associates for an order authorizing and approving the sale of the Washington Properties pursuant to the Purchase Agreement. Paragraph 3 of the Order reads as follows:

"Holywell and Gould, be and they hereby are, directed to segregate the share of net proceeds due Holywell and Gould from the sale of the real and personal property approved by this Order and to invest such proceeds in accordance with Section 345 of the Bankruptcy Code and hold same subject to further order of this Court."

4. BNY has reason to believe that all of the proceeds which may ultimately flow to Gould and/or Holywell as a result of the sale of the Washington Properties may not be segregated and invested as directed by this Court.

5. BNY has been informed by Gould that the net proceeds distributable to Gould and/or Holywell and related entities from the sale of the Washington Properties will be in the area of \$30,000,000 to \$34,000,000. However, counsel for Gould has advised BNY that only the funds directly payable to Gould and/or Holywell as general and/or limited partners of the partnerships selling the Washington Properties (i.e. approximately \$10,000,000 to \$14,000,000) are to be deposited in the segregated account.

6. A substantial portion of the net proceeds from the sale of the Washington Properties which are not payable to Gould and/or Holywell will be paid to corporations whose stock is wholly owned by Gould or Holywell.

7. Twin a wholly owned subsidiary of Holywell, is the fee owner and ground lessor of the 1300 North 17th Street Property, and is also the owner of a 91.67% general

partnership interest in 1300 North 17th Street Associates. (This information is based upon a letter from Gould to BNY dated December 3, 1982 setting forth Gould and Holywell's direct and indirect ownership interests in the Washington Properties, a copy of which is annexed hereto as Exhibit "A"). Twin will receive a significant portion of the net proceeds attributable to the 1300 North 17th Street Property.

8. In addition, Exhibit H of the Purchase Agreement indicates that \$3,547,000.00 is to be paid to certain entities as compensation for the termination of Management and Service Contracts. The entities that are to receive payment are Holywell Management Company, a division of Holywell, and Orion Industries, Inc., HWL Corporation and Parkwell, Inc., all of which are wholly owned subsidiaries of Holywell. (attached hereto as Exhibits "B", "C-1", "C-2" and "C-3" respectively are copies of Ex. H to the Purchase Agreement and copies of the financial statements of the sellers which set forth the aforementioned Management and Service Contracts).

9. In view of the fact that Holywell owns 100% of the stock of Twin, BNY requests the Court to order Holywell to cause Twin, to deposit in a segregated account, subject to further order of this Court, the proceeds from the sale of the Washington Properties less payment of all unrelated third party creditors. BNY further requests the Court to direct Holywell, as the sole stockholder of Orion Industries, Inc., Parkwell, Inc., HWL Corporation, Holywell Management Company, to cause to be deposited in such segregated account, subject to further order of the Court, any funds payable to Orion Industries, Inc., Parkwell, Inc., HWL Corporation, Holywell Management Company as a result of the "premature cancellation" of the service contracts referred to in Exhibits "B", "C-1", "C-2" and "C-3" attached hereto, or otherwise payable in connection with the sale of the Washington Properties.

10. In addition, this Court should direct that any other entities either wholly owned or controlled by Holywell and/or Gould, deposit any net proceeds received in connection with the sale of the Washington Properties into a segregated account.

11. Based upon the circumstances set forth above BNY requests that this Court direct Gould and/or Holywell to furnish the following to BNY and the Official Creditors' Committees of Gould and Holywell at least 3 days prior to the closing of the sale of the Washington Properties: (i) a copy of the proposed closing statement, (ii) a statement prepared by Touche Ross & Co., the accountants retained by Gould and other debtors herein, setting forth a detailed breakdown of the proposed payments and distributions to be made to Gould, Holywell, Twin Development, Dupont Land Associates, Orion Industries, Inc., HWL Corporation, Parkwell, Inc., Holywell Management Company and any other wholly owned or controlled entities, and (iii) a sworn statement of Gould that neither he, nor any of the other debtors herein, nor any entity in which he or any of the other debtors herein has an interest (whether direct or indirect), has any interest (whether direct or indirect) in any entity receiving any funds set forth in the Touche Ross & Co. statement delivered pursuant to subparagraph (ii) above except as specifically set forth therein.

WHEREFORE, BNY respectfully requests that this Court issue an Order granting the relief requested herein, together with such other and further relief this Court deems just and proper.

Respectfully submitted,

S. Harvey Ziegler, Esquire
Meyer, Weiss, Rose, Arkin,
Shampanier, Ziegler & Barash
407 Lincoln Road
Miami Beach, Florida 33139
Telephone: (305) 538-2531

and

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
Miami, Florida 33131-2398
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By: /s/ FRANCIS L. CARTER
Francis L. Carter

Of Counsel:

Thomas F. Noone, Esquire
Emmet, Marvin & Martin
48 Wall Street
New York, New York 10005
Telephone (212) 422-2974

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion was mailed this 30th day of November, 1984 to all parties on the attached list.

/s/ FRANCIS L. CARTER
Francis L. Carter

SERVICE LIST

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Morgan, Lewis & Bockius
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Holland & Knight
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Baltimore, Maryland 21202

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Barton-Aschman
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Washington, D.C. 20005

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Phoenix Cable Division
One Technology Parkway
Atlanta, Georgia 30348

Ampat/Southern Corp.
601 Nursery Road
Linthicum, Maryland 21090

National Micro Products
430 South Lake Blvd.
Richmond, Virginia 23236

Bankers Life Company
Attn. Joyce Hoffman, Esq.
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Des Moines, Iowa 50307

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A. Rodger Traynor, Jr., Esq.
Fowler, White, et al
501 City National Bank Bldg.
25 West Flagler St.
Miami, Florida 33130

EXHIBIT "A"

THEODORE B. GOULD
1300 North 17th Street
Suite 500
Arlington, VA 22209
(703) 522-3331

December 3, 1982

The Bank of New York
48 Wall Street
New York, NY 10015

Attention: Mr. James A. Hamilton
Vice President

Gentlemen:

This letter is to confirm my interest in the following limited partnerships (as used hereinafter, general partner percentages refer to a portion of the general partner share, whereas limited partner percentages refer to a portion of the entire partnership):

1. *1333 New Hampshire Associates* ("1333 N.H.A.")

The general partners of 1333 N.H.A. are NHA Corporation ("NHA Corp.") and myself. NHA Corp. holds 85.715% of the general partnership interest in 1333 N.H.A. I am the President of NHA Corp. The shareholders of NHA Corp. and their percentage of ownership are as follows:

Holywell Corporation	(66⅔%)
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Shareholders Unrelated to Myself	(33⅓%)
----------------------------------	--------

I hold 14.283% of the general partnership interest in 1333 N.H.A. (the beneficial interest in all but one percent of which having been assigned to Holywell Corporation) and a 4% limited partnership interest in 1333 N.H.A. In addition, I am one of eight co-partners in ISIS Investments, a Michigan co-partnership which holds a 1.3636% limited partnership

interest in 1333 N.H.A. I hold no interest in B.D.M. Company. Corpus Christi Associates holds 1½% limited partnership interest in 1333 N.H.A. My interest in Corpus Christi Associates is one percent (1%), as general partner.

One hundred percent of the general partnership interest in 1333 N.H.A. is equivalent to a 60% interest in the entire 1333 New Hampshire Associates. Therefore, my total individual interest in 1333 New Hampshire Associates is 31.698%.

2. *1300 North 17th Street Associates* ("1300 N. 17th St.")

The general partners of 1300 N. 17th St. are Twin Development Corporation ("TDC") and myself. TDC holds 91.67% of the general partnership interest. I am President of TDC. Shareholders of TDC and their percentage ownership are as follows:

Holywell Corporation	(100%)
----------------------	--------

I hold 8.33% of the general partnership interest in 1300 N. 17th St. and I hold a 6.336% limited partnership interest in 1300 N. 17th St. Holywell Corp. holds a 13.33% limited partnership interest in 1300 N. 17th St. I am President of Holywell Corp. The shareholders of Holywell Corp. and their percentage ownership are as follows:

Theodore B. Gould	(80%)
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Clark Enterprises, Inc.	(20%)
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Atlas Investors holds a 1.333% limited partnership interest in 1300 N. 17th St. Atlas Investors is 80% owned by Corpus Christi Associates, in which I own a 1% general partner interest. I own no interest in Car-Car Investors or in Youn-Paik Investors or in Seebacher-Seim Investors.

One hundred percent of the general partnership interest in 1300 N. 17th St. is equivalent to a 60% interest in the entire 1300 North 17th Street Associates. Therefore, my total

individual interest in 1300 North 17th Street Associates is 69.342%.

3. *1616 Reminc Limited Partnership* ("1616 Reminc")

The general partners of 1616 Reminc are Washington Properties, Inc. ("W.P. Inc.") and myself. W.P. Inc. holds 50% of the general partnership interest in 1616 Reminc. I hold 50% of the general partnership interest in 1616 Reminc (the beneficial interest in all but one percent of which having been assigned to Holywell Corporation). The officers and directors of W.P. Inc. are, to the best of my knowledge, Donald Cook, Andrew Kalman, Thomas Sullivan and Francis Newton, and the shareholders of W.P. Inc. and their percentage ownership are not known to me. Neither I, nor any entity in which I have an interest, are officers, directors or shareholders of W.P. Inc. 1616 Arlington Associates holds a 98.26% limited partnership interest in 1616 Reminc. I hold a 60% of the general partnership interest in 1616 Arlington Associates (the beneficial interest in all but one percent of which having been assigned to Holywell Corporation) and a 1% limited partnership interest in 1616 Arlington Associates. Corpus Christi Associates holds a 2% limited partnership interest in 1616 Arlington Associates.

One hundred percent of the general partnership interest in 1616 Arlington Associates is equivalent to a 50% interest in the entire 1616 Arlington Associates.

One hundred percent of the general partnership interest in 1616 Reminc is equivalent to an .80% interest in the entire 1616 Reminc Limited Partnership. Therefore, my total individual interest in 1616 Reminc Limited Partnership is 24.648%.

4. *Eleven DuPont Circle Associates* ("Eleven DuPont")

The general partners of Eleven DuPont are Henry J. Browne, D.C. Properties, Inc. and myself. Henry J. Browne holds 1% of the general partnership interest in Eleven

DuPont. D.C. Properties, Inc. holds 40% of the general partnership interest in Eleven DuPont. The officers and directors of D.C. Properties, Inc. are, to the best of my knowledge, Donald Cook, Andrew Kalman, Thomas Sullivan and Francis Newton, and the shareholders of D.C. Properties, Inc. and their percentage ownership are unknown to me. Neither I, nor any entity in which I own an interest, are officers, directors or shareholders of D.C. Properties, Inc. I hold 59% of the general partnership interest (the beneficial interest in all but one percent of which having been assigned to Holywell Corporation) and a 3.75% limited partnership interest in Eleven DuPont. I hold no interest in CMW Company, Green Turtle Cove Investment Co., or Caldwell-Lott Farms.

One hundred percent of the general partnership interest in Eleven DuPont is equivalent to a 50% interest in the entire Eleven DuPont Circle Associates. Therefore, my total individual interest in Eleven DuPont Circle Associates is 27.409%.

The purpose of 1333 N.H.A. is to acquire, own, lease, build upon, sell, etc. real property including real property located at 1333 New Hampshire Avenue, Washington, DC and to develop, construct and operate a 12-story office building thereon.

The purpose of 1300 N. 17th St. is to acquire, own, sell, etc. real property located at 1300 N. 17th Street, Rosslyn, VA and develop, construct and operate a 24-story office building including a 5-level parking garage thereon.

The purpose of 1616 Reminc is to acquire an interest in land on Fort Myer Drive and Fairfax Drive, Arlington County, VA and to construct and operate an office building thereon.

The purpose of Eleven DuPont is to develop, construct, operate and sell an office building, improvements and land located at 11 DuPont Circle, Washington, DC.

Very truly yours,

/s/ THEODORE B. GOULD

Theodore B. Gould

sgc

EXHIBIT "B" **ALLOCATION OF PURCHASE PRICE**

	<u>Amount</u>
"Washington Property", (a) Fee Interest in Improvements and Leasehold Estate; and (b) Fee Interest in Land and Lessor's Interest in Ground Lease	23,000,000
"1616 Property", (a) Fee Interest in Improvements and Leasehold Estate and (b) Fee Interest in Land and Lessor's Interest in Ground Lease	30,000,000
"Twin Property", Fee Interest in Improvements and Leasehold Estate	47,000,000
"Twin Property", Fee Interest in Land and Lessor's Interest in Ground Lease	6,213,000
Value of Contractors' Interest in Management and Service Contracts which Sellers are Required to Prematurely Cancel	3,547,000
Brokerage Commission	<u>2,240,000</u>
TOTAL:	<u><u>112,000,000</u></u>

EXHIBIT "C-1"

**ELEVEN DUPONT CIRCLE ASSOCIATE
A LIMITED PARTNERSHIP**

NOTES TO FINANCIAL STATEMENTS

YEARS ENDED DECEMBER 31, 1983 AND 1982

**A. ORGANIZATION AND SUMMARY OF SIGNIFICANT
ACCOUNTING POLICIES:**

The Partnership is a limited partnership which owns and operates a nine-story, 145,000 square foot office building in the District of Columbia.

The financial statements of the Partnership are prepared on the accrual basis of accounting and include only those assets, liabilities, and results of operations which relate to the business of the Partnership. Depreciation is computed using accelerated methods for building and components and the straight-line method for tenant improvements and equipment based on estimated useful lives of 40 years for the building and components and three to ten years for tenant improvements and equipment. Mortgage placement costs and other deferred costs are amortized over the appropriate loan period and lease term on a straight-line basis.

B. INVESTMENT IN OFFICE BUILDING, AT COST:

	December 31,	
	1983	1982
Building and equipment	\$5,156,801	\$5,156,801
Tenant improvements	1,838,417	1,837,260
	6,995,218	6,994,061
Less accumulated depreciation	3,013,355	2,686,049
	<u>\$3,981,863</u>	<u>\$4,308,012</u>

C. RELATED-PARTY TRANSACTIONS:

Service Contracts

Holywell Corporation and its subsidiaries, which are wholly owned by Theodore B. Gould, a general partner, provide a variety of services for the Partnership.

Holywell Management Company, a division of Holywell Corporation, provides management and marketing services for the Partnership under two separate agreements that extend through December 31, 1983. Management and marketing fees for 1983 were \$58,063 and \$55,566 and in 1982 were \$57,124 and \$52,920, respectively.

Orion Industries, Inc., a wholly owned subsidiary of Holywell Corporation, provides janitorial, engineering, and security services for the Partnership. The contracts for janitorial, engineering, and security services are for five years and expire December 31, 1988. Fees related to these service agreements are as follows:

	<u>1983</u>	<u>1982</u>
Janitorial services	\$113,832	\$98,949
Engineering services	77,172	58,800
Security services	116,804	92,359

Notes Receivable

The Partnership had notes and interest receivable from Holywell Corporation and two of Holywell's wholly owned subsidiaries, HWL Corporation and Charleston Center Corporation, at December 31, 1982. Also, at that date, a note was due from 1300 North 17th Street Associates, a limited partnership, of which Theodore B. Gould is a general partner. These notes were repaid in full during 1983.

Name	PRINCIPAL	ACCRUED INTEREST	TOTAL
	December 31, 1982	December 31, 1982	December 31, 1982
Holywell Corporation	\$ 799,600	\$289,816	\$1,089,416
HWL Corporation	30,000	16,056	46,056
Charleston Center Corporation	55,000	5,101	60,101
1300 North 17th Street Associates	148,000	13,408	161,408
	<u>\$1,032,600</u>	<u>\$324,381</u>	<u>\$1,356,981</u>

Note Payable

The note payable to related party represents funds loaned by Dupont Land Associates, a related party. This note is noninterest bearing and has no specified due date.

Leases

The Partnership leases the land on which the office building is situated from Dupont Land Associates, a related party. The lease term of 99 years became effective February 9, 1978, and provides for net annual rent of \$280,224 through December 31, 1998. Commencing January 1, 1999, until expiration, annual rental payments will be \$350,280.

The Partnership leases parking garage space to Parkwell, Inc., a wholly owned subsidiary of Holywell Corporation, under a lease agreement which expires May 31, 1984. Terms of the lease provide for base annual rental payments of \$60,000. In addition, percentage rent equal to 40% of Parkwell's gross receipts in excess of \$115,000 per lease year shall be paid to the Partnership. No additional percentage rent was earned during 1983

or 1982. Approximately \$18,000 and \$13,000 in rental payments were due to the Partnership at December 31, 1983 and 1982, respectively.

Holywell Corporation leased office space from the Partnership under a lease which was terminated in March 1983. Rental income from Holywell in 1983 and 1982 was approximately \$20,000 and \$140,000, respectively. Rent receivable under this agreement at December 31, 1983 and 1982 was \$11,000 and \$15,000, respectively.

EXHIBIT "C-2"

1616 REMINC LIMITED PARTNERSHIP

NOTES TO FINANCIAL STATEMENTS

YEARS ENDED DECEMBER 31, 1983 AND 1982

C. RELATED-PARTY TRANSACTIONS:

Service Contracts

Holywell Corporation and its subsidiaries, which are wholly owned by Theodore B. Gould, a general partner, provide a variety of services for the Partnership.

Holywell Management Company (HMC), a division of Holywell Corporation, provides management and marketing services for the Partnership under an agreement that extends through December 31, 1988. Management and marketing fees for 1983 and 1982 were \$182,639 and \$182,671, respectively.

Orion Industries, Inc., a wholly owned subsidiary of Holywell Corporation, provides janitorial, engineering, and security services for the Partnership. The contracts for janitorial, engineering, and security services are for five years and expire December 31, 1988. Fees related to these service agreements are as follows:

	<u>1983</u>	<u>1982</u>
Janitorial services	\$233,104	\$189,768
Engineering services	103,692	85,572
Security services	183,372	146,460

Notes Receivable

The Partnership had notes and interest receivable from Holywell Corporation and one of Holywell's wholly owned subsidiaries, Charleston Center Corporation, at December 31, 1982. Also, at that date, a note was due from 1300 North 17th Street Associates, a limited partnership of which Theodore B. Gould is a general partner. All notes were paid in full in 1983.

EXHIBIT "C-3"

1300 NORTH 17TH STREET ASSOCIATES A LIMITED PARTNERSHIP

NOTES TO FINANCIAL STATEMENTS

YEARS ENDED DECEMBER 31, 1983 AND 1982

A. ORGANIZATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES:

The Partnership is a limited partnership which owns and operates an 18-story, 357,000 square foot office building in Arlington, Virginia.

The financial statements of the Partnership are prepared on the accrual basis of accounting and include only those assets, liabilities, and results of operations which relate to the business of the Partnership. Depreciation is computed using accelerated methods for building and components and the straight-line method for tenant improvements and equipment based on their estimated useful lives of 10 to 45 years for the building and components and 5 to 15 years for tenant improvements and equipment. Mortgage placement costs and other deferred costs are amortized over the appropriate loan period and lease term on a straight-line basis.

B. INVESTMENT IN OFFICE BUILDING, AT COST:

	December 31,	
	1983	1982
Building and equipment	\$15,495,362	\$15,477,836
Tenant improvements	5,645,210	5,339,630
	21,140,572	20,817,466
Less accumulated depreciation	(3,676,265)	(2,612,531)
	<u>\$17,464,307</u>	<u>\$18,204,935</u>

C. RELATED-PARTY TRANSACTIONS:

Service Contracts

Holywell Corporation and its subsidiaries which are wholly owned by Theodore B. Gould, a general partner, provide a variety of services for the Partnership.

Holywell Management Company, a division of Holywell Corporation, provides management and marketing services for the Partnership, under an agreement that extend through December 31, 1988. Management fees for 1983 and 1982 were \$260,291 and \$233,520, respectively.

Orion Industries, Inc., a wholly owned subsidiary of Holywell Corporation, provides janitorial, engineering, and security services for the Partnership. The contracts for janitorial, engineering, and security services are for five years and expire December 31, 1988. Fees related to these service agreements are as follows:

	<u>1983</u>	<u>1982</u>
Janitorial services	\$239,963	\$207,788
Engineering services	106,788	84,564
Security services	176,700	137,700

1616 REMINC LIMITED PARTNERSHIP
NOTES TO FINANCIAL STATEMENTS
YEARS ENDED DECEMBER 31, 1983 AND 1982

C. RELATED-PARTY TRANSACTIONS: (Continued)

Name	PRINCIPAL	ACCRUED	TOTAL
	December 31, 1982	December 31, 1982	December 31, 1982
Holywell Corporation	\$ 910,600	\$224,691	\$1,135,291
Charleston Center Corporation	90,000	3,324	93,324
1300 North 17th Street Associates	100,000	9,203	109,203
	<u>\$1,100,600</u>	<u>\$237,218</u>	<u>\$1,337,818</u>

Notes Payable

The note payable to related party consists of noninterest-bearing funds loaned by Arlington Associates, a limited partner, with no specified due date.

Leases

The Partnership leases a computerized Honeywell Delta 1000 building energy management system from HWL Corporation, a wholly owned subsidiary of Holywell Corporation, with rental payments of \$3,454 per month. This agreement can be terminated by either party with one month's written notice.

The Partnership leases parking garage space to Parkwell, Inc., a wholly owned subsidiary of Holywell Corporation, under a lease agreement which expires October 31, 1988. Terms of the lease provide for base annual rental payments of \$185,690. In addition, percentage rent equal

to 50% of Parkwell's gross receipts in excess of \$350,000 per lease year shall be paid to the Partnership. Percentage rental income was approximately \$39,500 in 1983 and \$23,000 in 1982. Approximately \$119,000 and \$39,000 in rental parking payments were due to the Partnership at December 31, 1983 and 1982, respectively.



APPENDIX C

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF FLORIDA

Cases Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE

HOLYWELL CORPORATION, et al.

Debtors.

EMERGENCY MOTION TO TREAT PROCEEDS OF THE SALE OF CERTAIN REAL AND PERSONAL PROPERTY AS CASH COLLATERAL, TO SEGREGATE AND ACCOUNT FOR CASH COLLATERAL

The Bank of New York ("BNY"), a secured creditor moves this Court, pursuant to Bankruptcy Code §363 and Bankruptcy Rules 4001 and 9014, for an order to compel the debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Reminc Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle") and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") cash collateral and to segregate and account for cash collateral on the following grounds:

1. (a) BNY, a construction lender, from time to time since March 27, 1980 has made loans (the "Construction

Loans") to Miami Center Limited Partnership ("MCLP") and Chopin Associates ("Chopin") in connection with the construction of the Miami Center Phase 1 project ("Phase 1"). The loan agreements entered into in March 1980 contemplated \$112,500,000 in loans to finance land acquisition and construction of Phase 1. Due primarily to delays and hard and soft cost overruns the total costs far exceeded the original estimates. BNY, at the request of MCLP and Chopin, made additional loans. The unpaid principal amount of the Construction Loans to Chopin and MCLP, together with certain overdraft indebtedness, amounts to \$196,711,481.58, plus unpaid and accrued thereon since December 1, 1983.

The Construction Loans, overdraft indebtedness and accrued and unpaid interest are guaranteed by guarantees of payment given to BNY by, among others, Holywell Corporation ("Holywell") (the "Guarantees"); and are secured, *inter alia*, by mortgages on Phase I; by an assignment of and security interest in all right, title and interest of Theodore B. Gould ("Gould") (or any entity in which Gould has or obtains an interest) to distributions as a general and/or limited partner from 1300, 1616 and Dupont Circle; by an assignment of all right, title and interest of Holywell (including, without limitation, any interest obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any other sums due or to become due to Holywell as a general and/or limited partner from 1300, 1616, Dupont Land and Dupont Circle; by a pledge of 100% of the issued and outstanding stock of Holywell; by a pledge of the stock of certain of Holywell's wholly owned subsidiaries, including without limitation, 100% of the issued and outstanding stock of TDC, 100% of the issued and outstanding stock of Orion Industries, Inc. ("Orion"), 100% of the issued and outstanding stock of HWL Corporation ("HWL") and 100% of the issued and outstanding stock of Parkwell, Inc. ("Parkwell").

(b) On or about October 14, 1983 BNY made a loan to Holywell in the principal amount of \$1,750,000 (the "Holywell Loan"), which Holywell Loan is evidenced by a Note, dated October 14, 1983, given by Holywell to BNY (the "Holywell Note"). The purpose of the Holywell Loan was to enable Holywell and Gould to settle a lawsuit brought by Clark Enterprises, Inc. ("Clark") a former shareholder of Holywell and to enable Gould to acquire the Holywell stock owned by Clark. As a result of the settlement, Gould became the owner of 100% of the issued and outstanding stock of Holywell. The unpaid principal amount of the Holywell Loan is \$1,750,000 and interest is accrued and unpaid thereon since October 14, 1983. The payment of all principal and interest on the Holywell Loan is guaranteed by Gould pursuant to a guarantee of payment dated October 14, 1983 (the "Gould Guarantee"). The Gould Guarantee is secured, *inter alia*, by an assignment of and security interest in all right, title and interest of Gould (or any entity in which Gould has or obtains an interest) to distributions as a general and/or limited partner of 1300, 1616 and Dupont Circle which assigned and security interest is superior to those described in (a) above. Holywell, as security for its obligations under the Holywell Note, assigned to BNY all of its right, title and interest (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to Holywell as a general and/or limited partner of 1300, 1616, Dupont Circle and Dupont Land.

2. On August 22, 1984 Holywell, Gould, MCLP, Chopin and Miami Center Corporation ("MCC") each filed a petition for reorganization under Chapter 11, Section 301 of the Bankruptcy Code (the "Code"). The within Chapter 11 cases are being jointly administered pursuant to Order of this Court.

3. On October 22, 1984 this Court granted the motion of Holywell and Gould as partners and stockholders in TDC,

1300, 1616, Dupont Circle and Dupont Land for an order authorizing and approving the sale of the Washington Properties pursuant to the Purchase Agreement. Paragraph 3 of the Order reads as follows:

“Holywell and Gould, be and they hereby are, directed to segregate the share of net proceeds due Holywell and Gould from the sale of the real and personal property approved by this Order and to invest such proceeds in accordance with Section 345 of the Bankruptcy Code and hold same subject to further order of this Court.”

By Order dated on or about December 10, 1984 Gould and Holywell were to cause all funds received by related entities in connection with the sale of the Washington Properties to be deposited in a segregated account. Paragraph 4 of that Order reads as follows:

“Holywell and Gould shall cause all net funds payable into such segregated account pursuant to Paragraphs 1, 2 and 3 above to be invested in accordance with Section 345 of the Bankruptcy Code subject to any claim of lien by Bank of New York and subject to further order of this Court. The interest on such funds may be used with prior approval of this Court for operation of Miami Center subject to the prior orders of the court in regard to use of income. However, the transfer and use shall not prejudice any security, lien or future claims by any creditor.”

4. BNY, by reason of the following agreements, has a validly perfected first security interest in (i) any distributions to Gould (or any entity in which Gould has or obtains an interest) as a general and/or limited partner in 1300, 1616 and Dupont Circle, and (ii) all right, title and interest of Holywell (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to

distributions, sales proceeds, and any other monies due or to become due to Holywell as a general and/or limited partner in 1300, 1616, Dupont Land and Dupont Circle:

(a) Hypothecation and Security Agreement dated May 14, 1981, by and between Gould, MCLP, and BNY, as amended, whereby Gould hypothecated to MCLP, and MCLP, as security for the Construction Loans, pledged to the Bank, *inter alia*, all right title and interest of Gould (or any entity in which Gould has or obtains an interest) to distributions, as a general and/or limited partner from 1300, 1616 and Dupont Circle. (Gould's interests in 1333 New Hampshire Associates was also hypothecated and pledged but this partnership's property has since been sold). A copy of the Hypothecation and Security Agreement dated May 14, 1981 and all amendments and modifications thereto are annexed hereto and marked as Exhibit "A". BNY's interest in the distributions from 1300, 1616 and Dupont Circle to Gould and the Gould related entities was perfected by the filing of UCC-1 Financing Statements, naming Gould as debtor, in the Circuit Court Clerk's Office, Albemarle County, Virginia on May 26, 1981, file number 10,629, and in the office of the Secretary of State of the Commonwealth of Virginia on May 27, 1981, file number 810513876.

(b) Assignment and Security Agreement, dated June 23, 1983, by Holywell to BNY, whereby Holywell, as collateral security for Holywell's obligations under the Guarantees, assigned to BNY and granted BNY a first priority security interest in, *inter alia*, all right title and interest of Holywell (including, without limitation any interest obtained as a result of any assignment or beneficial

assignment) to distributions, sales proceeds and any and all monies due and/or to become due to Holywell as a general or limited partner of 1300, 1616, Dupont Circle, and Dupont Land. A copy of the Assignment and Security Agreement dated June 23, 1983 is attached hereto and marked as Exhibit "B". BNY's security interest in the distributions and sales proceeds from 1300, 1616, Dupont Circle and Dupont Land was perfected by the filing of UCC-1 Financing Statements naming Holywell as debtor, in the Circuit Court Clerk's Office, Arlington County, Virginia on October 25, 1983, file numbers 32229, 32230 and 32231 and in the real property records in Washington, D.C. on December 1, 1983, file number 39026.

(c) Amendment No. 1 dated October 14, 1983 to the Assignment and Security Agreement dated June 23, 1983 by Holywell to BNY whereby BNY was granted, as security for the repayment of the Holywell Loan, an assignment of all right, title and interest of Holywell (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due and to become due to Holywell as a general and/or limited partner in 1300, 1616, Dupont Land and Dupont Circle. A copy of Amendment No. 1 is attached hereto and marked as Exhibit "C". BNY's security interest in the distributions and sales proceeds from 1300, 1616, Dupont Land and Dupont Circle was perfected by the filing of financing statements in the Clerk's Office in Arlington County, Virginia on October 25, 1983, file numbers 32229, 32230 and 32231, and in the real property records in Washington D.C. on December 1, 1983, file number 39026.

(d) Assignment and Security Agreement, dated October 14, 1983, by Gould to BNY whereby Gould, to secure the Gould Guarantee, granted BNY an assignment of any security interest in all collateral set forth in the Hypothecation and Security Agreement dated May 14, 1981, as amended, referred to in (a) above, by and between Gould and MCLP and BNY. A copy of the Assignment and Security Agreement dated October 14, 1983 is attached hereto and marked as Exhibit "D".

5. Based on an analysis of the limited partnership agreements for 1300, 1616, Dupont Circle and Dupont Land and based on the information set forth in a letter dated December 3, 1983 from Gould to BNY,* confirming Gould's and Holywell's interests in the partnerships which own the Washington Properties (a copy of said letter is attached hereto and marked as Exhibit "E") Gould's and Holywell's ownership interests in 1300, 1616, Dupont Circle and Dupont Land are as follows:

- | | |
|-------------------|-----------|
| (a) 1300 | — 69.342% |
| (b) 1616 | — 45.90% |
| (c) Dupont Circle | — 31.37% |
| (d) Dupont Land | — 31.37% |

An explanation of the computation of Gould's and Holywell's ownership interests in the aforementioned limited partnerships is set forth in the attached Schedule "1".

*Note that the percentage of Gould's total direct and indirect general and limited partnership interests differs from the percentages set forth in the letter attached hereto and marked as Exhibit "E". Based upon information available to BNY it appears that Gould's and Holywell's ownership interests in 1300, 1616, Dupont Circle and Dupont Land were accurately set forth in the letter, however the computation of Gould's and Holywell's percentage interests in the partnerships as set forth in the letter is obviously erroneous.

6. The distributions to Gould and Holywell from the partnerships set forth above are clearly "cash collateral" as defined by Code §363(a) since BNY has a perfected first security interest as collateral for the Holywell Loan and a perfected second security interest for the Construction Loans in the distributions made or to be made to Gould and Holywell (or any entity in which Gould has or obtains an interest) under state law, and such a security interest in post-petition proceeds is authorized by Code §552(b).

7. The cash collateral forms (i) a part of the security granted to BNY in connection with the Construction Loans and the overdraft indebtedness, in the aggregate principal amount of \$196,711,481.58, accrued and unpaid interest thereon, and (ii) the only security to BNY in connection with the Holywell Loan together with the accrued and unpaid interest thereon.

8. In summary, as set forth above and in its Memorandum of Law, BNY respectfully requests that all distributions flowing to Gould and Holywell and its related entities as set forth above be deemed "cash collateral" to be held in the segregated account referred to in Paragraph 3 above subject to the continuing security interest in favor of BNY, and that Gould, Holywell and the related entities be directed to account for said cash collateral.

WHEREFORE, BNY respectively requests that this Court issue an Order granting the relief requested herein together with such other and further relief as this Court deems just and proper.

DATED this 13 day of December, 1984.

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By: /s/ Francis L. Carter

FRANCIS L. CARTER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing
Emergency Motion to Treat Proceeds Of The Sale Of Certain
Real and Personal Property As Cash Collateral, To Segregate
And Account For Cash Collateral was mailed this 13 day of
December, 1984 to all parties on the attached list.

By: /s/ Francis L. Carter

FRANCIS L. CARTER

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SCHEDULE 1
COMPUTATION OF GOULD'S AND HOLYWELL'S
INTEREST IN LIMITED PARTNERSHIPS

(a) 1300 — A one hundred percent general partnership interest in 1300 is equal to a 60% interest in the total ownership of 1300. TDC owns 91.67% of the general partnership interests. Gould owns 8.33% of the general partnership interests. TDC is wholly owned by Holywell. Gould owns 100% of the issued and outstanding stock of Holywell. Gould and Holywell therefore own 100% of the general partnership interests which is equivalent to a 60% interest in the entire partnership.

A one hundred percent limited partnership interest in 1300 is equal to a 40% interest in the total ownership of 1300. Gould owns a 6.336% limited partnership interest and Holywell owns a 13.33% limited partnership interest. Gould and Holywell therefore own approximately 19.66% of the limited partnership interest in 1300 which is equivalent to a 9.342% interest in the entire partnership.

Therefore, taken as a whole Gould's and Holywell's direct and indirect general and limited partnership interests entitle them to approximately 69.342% of the partnership distributions resulting from the sale of the partnership asset.

(b) 1616 — A one hundred percent general partnership interest in 1616 is equal to an 80% interest in the total ownership of 1616. Gould owns 50% of the general partnership interests. Gould's general partnership interest is therefore equivalent to a 40% interest in the entire partnership.

A one hundred percent limited partnership interest in 1616 is equal to a 20% interest in 1616. 1616 Arlington Associates owns a 98.26% limited partnership interest in 1616. Gould owns a 30% interest in 1616 Arlington Associates. Gould's direct and indirect limited partnership

interests are therefore equivalent to a 5.90% interest in the entire partnership.

Therefore, Gould's and/or Holywell's direct and indirect general and limited partnership interests entitle them to approximately 45.90% of the partnership distributions resulting from the sale of partnership assets.

(c) *Dupont Circle* — A one hundred percent general partnership interest in Dupont Circle is equal to a 50% interest in Dupont Circle. Gould owns 59% of the general partnership interests. Gould's general partnership interest is therefore equivalent to a 29.5% interest in the entire partnership.

A one hundred percent limited partnership interest in Dupont Circle is equal to 50% of the total ownership of Dupont Circle. Gould owns approximately 3.75% of the limited partnership interests. Gould's limited partnership interests are therefore equivalent to a 1.87% interest in the entire partnership.

Therefore, Gould's and/or Holywell's direct and indirect general and limited partnership interest entitle them to approximately 31.37% of the partnership distributions resulting from the sale of the partnership asset.

(d) *Dupont Land* — A one hundred percent general partnership interest in Dupont Land is equal to 50% interest of the total ownership of Dupont Land. Gould owns 59% of the general partnership interests. Gould's general partnership interest is therefore equivalent to a 29.5% interest in the entire partnership.

A one hundred percent limited partnership interest in Dupont Land is equal to 50% of the total ownership of Dupont Land. Gould owns approximately 3.75% of the limited partnership interests. Gould's limited partnership interests are therefore equivalent to a 1.87% interest in the entire partnership.

Therefore, Gould's and Holywell's general and limited partnership interests entitle them to approximately 31.37% of the partnership distributions resulting from the sale of the partnership asset.

EXHIBIT "A"

HYPOTHECATION AND SECURITY AGREEMENT

Agreement made this 14th day of May, 1981 among Theodore B. Gould ("Gould"), Miami Center Limited Partnership ("Borrower") and The Bank of New York ("Lender").

W I T N E S S E T H:

WHEREAS, pursuant to a Building Loan Agreement dated as of the 27th day of March, 1980 as supplemented (the "Agreement") by and between Charter Mortgage Company and the Borrower, which Agreement was assigned to the Lender, the Lender is advancing funds to the Borrower for the purpose of funding a portion of the cost of the construction of the Improvements; and

WHEREAS, Gould is the owner of the interests in personal property more particularly described in Schedule A attached hereto, which personal property and all products and proceeds thereof, accessions and additions thereto and substitution therefor are herein collectively called the "Collateral"; and

WHEREAS, Gould wishes to hypothecate the Collateral to the Borrower for the purpose of permitting the Borrower to create in favor of the Lender a continuing security interest therein as security for all obligations of the Borrower under the Agreement and the Loan Documents (hereafter called the "Obligations").

NOW, THEREFORE, in consideration of the premises, the mutual covenants, terms and conditions herein contained and other good and valuable consideration the receipt and sufficiency of which the parties hereto acknowledge, the parties hereto, intending to be legally bound, do hereby covenant and agree as follows:

1. *Definitions:* Terms not otherwise defined herein shall have the same meanings as set forth in the Agreement.

2. *Hypothecation:* Gould hereby represents, covenants and agrees:

(a) That the Borrower is authorized to assign, pledge, grant a continuing security interest in, and a lien on, the Collateral to the Lender to secure the Obligations.

(b) That when so pledged, assigned and/or liened, the Collateral shall secure the Obligations and a continuing first security interest in the Collateral shall exist, and will continue to exist, in the Lender's favor as security for the Obligations, subject only to the encumbrances specified in Schedule A.

(c) Take all agreements which the Borrower has made or may make with the Lender regarding the Collateral shall be applicable to the Collateral to the same extent as if such Collateral were owned by Borrower, and Gould hereby expressly ratifies, consents to and adopts any and all agreements which Borrower has made or may hereafter make with the Lender with respect to the Collateral.

(d) That any additions to, accumulations of, substitutions for, accessions to and proceeds of the Collateral in any form whatsoever which shall come into possession of Gould or the Borrower shall be held in trust for the Lender and upon receipt thereof shall be delivered to the Lender in the form received.

(e) That without notice to or consent of Gould, Lender may (i) release any endorser, guarantor or any collateral given to secure any of the Obligations and (ii) at any time, and from time to time, extend the time of payment or renew in whole or in part any of the Obligations for such time or times as the Lender may determine, and all of the provisions and authorizations contained herein shall apply to all such renewals and extensions.

(f) That Gould waives any rights which Gould may have under Section 9-112 of the Uniform Commercial Code and waives notice of the acceptance of or reliance upon any of the provisions of this Hypothecation and Security Agreement by the Lender.

3. *Assignment:* To secure payment and performance of the Obligations, Borrower hereby assigns, pledges, and grants a continuing first priority security interest in, and a lien on, all of Borrower's right, title and interest in and to the Collateral in favor of Lender as security for all of the Obligations, subject only to the encumbrances specified in Schedule A.

4. *Special Accounts:* Gould agrees to deposit immediately upon receipt in a special deposit account maintained with Lender all funds payable to Gould pursuant to a certain Agreement of Joint Venture, dated as of March 2, 1981 (the "Joint Venture Agreement"), between Gould and Olympia & York Florida Equity Corp., which joint venture is known as Miami Center Joint Venture (the "Joint Venture"), with the exception of those funds in excess of \$2,900,000 specified in Sections 2.3(b) and 2.3(d) of the Joint Venture Agreement payable to Gould as reimbursement for expenses incurred by Gould. In addition, Gould agrees that any and all cash proceeds of the Collateral shall be deposited by Gould in the form received in the special account. Until an Event of Default shall occur hereunder, Gould may direct the Lender to invest and reinvest such funds and cash proceeds in short-term investments satisfactory to Lender. All such investments shall be held by the Lender in a special safe-keeping account. Any such investments and all interest, dividends, accumulations and other earnings on the funds or the investments in the special safe-keeping account shall be redeposited and reinvested and shall become part of the Collateral. The Lender shall have no obligation or duty to inquire into the wisdom or prudence of any such investments and no liability for the validity, genuineness, or collectibility

of such investments or for any depreciation in value or loss arising from such investments.

5. *Covenants, Representations and Warranties:* Gould and Borrower covenant, represent and warrant, and, so long as the Obligations hereby secured remain outstanding, shall be deemed continuously to covenant, represent and warrant, that:

(a) Gould and Borrower each has the power and authority to enter into this Hypothecation and Security Agreement, and when executed by Gould and Borrower this Hypothecation and Security Agreement shall constitute a valid and binding obligation of Gould and Borrower enforceable against each in accordance with its terms.

(b) With respect to the Collateral, the Lender shall be under no duty to send notices, perform services, exercise any rights of collection, enforcement, conversion or exchange, vote, pay for insurance, taxes or other charges or take any action of any kind in connection with the management thereof and its only duty with respect thereto shall be to use reasonable care in its custody and preservation of the Collateral while the Collateral is in its actual possession, which shall not include any steps necessary to preserve rights against prior or third parties.

(c) Neither Gould nor Borrower has heretofore hypothecated, assigned, pledged or granted a security interest in, or otherwise encumbered, the Collateral or any rights or interest therein or thereto, except as provided in Schedule A.

(d) No applicable law or governmental regulation and nothing in any agreement to which the Borrower or Gould is a party purports to forbid, restrict, or subject to conditions precedent the hypothecation and creation of a security interest in and lien on the Collateral as herein contained.

(e) Borrower and Gould hereby authorize the Lender at the Borrower's and Gould's expense to file one or more

financing statements to give notice of the hypothecation and perfect the security interests herein specified, and Gould and Borrower hereby jointly and severally agree to pay all costs of file or title searches made by the Lender with respect to Gould, the borrower or the Collateral.

(f) Borrower and Gould will not further hypothecate, pledge, assign, or otherwise create or suffer to exist a security interest in, or lien on, the Collateral in favor of anyone other than the Lender.

(g) Borrower and Gould will do, file, record, make, execute and deliver all such acts, deeds, things, notices, instruments and financing statements as may be necessary or desirable to vest in and assure to the Lender its security interest in the Collateral and the enforcement of and giving effect to its rights, remedies and powers hereunder. Gould hereby further agrees that on or before May 15, 1981, he will deliver, or cause to be delivered, to Lender true and complete copies of the Joint Venture Agreement, and, on or before June 15, 1981, he will deliver or cause to be delivered, to Lender true and complete copies of all partnership agreements, together with all amendments thereto, of the partnerships owning the properties described in Schedule A, together with all necessary consents and directions required hereby or thereby to effectuate the hypothecation provided for herein. Gould shall furnish such current audited financial information with respect to the Collateral as shall be requested by Lender from time to time. In addition, Gould shall deliver to Lender on or before June 15, 1981 a mortgage, in form and substance satisfactory to the Lender, on property owned by Charleston Center Corp. located in Charleston, South Carolina (subject only to a mortgage held by American Security Bank, N.A. in the principal amount of \$1,800,000) together with such title insurance and other information as Lender may require.

(h) Without the prior written approval of Lender, which approval shall be within the sole and absolute

discretion of the Lender, Gould shall not amend, modify or terminate (not permit the amendment, modification or termination of) the Joint Venture, the Joint Venture Agreement or any of the partnerships set forth in Schedule A, nor shall Gould sell, assign or otherwise transfer or encumber his interest in the Joint Venture, the Joint Venture Agreement or any of the partnerships set forth in Schedule A.

(i) Neither Gould nor Borrower shall transfer or withdraw or attempt to transfer or withdraw any amounts from the special deposit account and special safe-keeping account referred to in Section 4 hereof without the prior written consent of the Lender, which consent shall be within the sole and absolute discretion of the Lender.

(j) The security interest created herein constitutes and shall constitute a first priority security interest in and lien on the Collateral, subject only to the encumbrances specified in Schedule A.

(k) Gould has delivered to the Joint Venture irrevocable instructions directing that payments due and to become due to Gould pursuant to Section 2.3(e) of the Joint Venture Agreement be sent directly to the Lender, and Gould is delivering to Lender on the date hereof a true copy of such instructions.

6. *Events of Default:* The following shall constitute "Events of Default" hereunder:

(a) The occurrence of an Event of Default under the Agreement or under any of the Loan Documents; or

(b) If Gould or the Borrower shall fail to perform or observe any covenant or agreement on its part to be performed or observed under this Hypothecation and Security Agreement; or

(c) If any representation or warranty of Gould or the Borrower contained herein shall prove at any time to be false or misleading; or

(d) If the Lender shall not receive directly from or on behalf of the Joint Venture the payments required to be made to Gould under Section 2.3(e) of the Joint Venture Agreement within three (3) days of the date such payments are due and payable under the Joint Venture Agreement.

7. *Remedies on Default:* Upon the occurrence of an Event of Default hereunder, Lender shall have, in addition to all of the rights and remedies provided for in the Agreement and all of the rights and remedies allowed by law, the rights and remedies of a secured party under the Uniform Commercial Code as in effect at that time and, without limiting the generality of the foregoing, Lender may immediately, without demand of performance and without notice of intention to sell or of the time or place of sale or of redemption or other notice or demand whatsoever to Gould or Borrower, all of which are hereby expressly waived, and without advertisement, sell at any time or from time to time, at public or private sale, grant options to purchase or otherwise realize upon, in the State of New York, or elsewhere, the whole or any part of the Collateral. At any such sale or other disposition, the Lender, its assigns, officers or nominees, may purchase the whole or any part of the Collateral, free from any right or redemption on the part of Gould or the Borrower, which right is hereby waived and released.

No failure on the part of the Lender to exercise, and no delay in exercising, any right, remedy or power hereunder shall operate as a waiver thereof, nor shall any single or partial exercise by the Lender of any right, remedy or power hereunder preclude any other or future exercise of any other right, remedy or power.

Each and every right, remedy or power hereby granted to the Lender or allowed it by law or other agreement shall be cumulative and not exclusive, and may be exercised by the Lender from time to time.

8. *Sale of Pledged Shares:* Borrower and Gould recognize that the Lender may be unable or may not desire to effect a public sale of all or part of any securities set forth in Schedule A by reason of certain prohibitions and restrictions contained in the Securities Act of 1933, as amended, and may be compelled or deem it desirable to resort to one or more private sales to a restricted group of purchasers who will be obliged to agree, among other things, to acquire such pledged securities for their own account, for investment, and not with a view to the distribution or resale thereof. Borrower and Gould agree, to the extent applicable, that private sales so made may be at prices and other terms less favorable to the seller than if the pledged securities were sold at public sales and that the Lender has no obligation to delay sale of any such pledged securities for the period of time necessary to permit the issuer of said pledged securities, even if such issuer would agree, to register such pledged securities for public sale under the Securities Act of 1933, as amended. Gould and Borrower agree that private sales made under the foregoing circumstances shall be deemed to have been made in a commercially reasonable manner.

9. *Governing Law:* This Hypothecation and Security Agreement shall be construed, interpreted and enforced according to the laws of the State of New York.

IN WITNESS WHEREOF, this Hypothecation and Security Agreement has been duly executed by the undersigned on the day first above-written.

/s/ THEODORE B. GOULD

Theodore B. Gould

MIAMI CENTER LIMITED PARTNERSHIP

**By: Miami Center Corporation,
General Partner**

By: /s/ THEODORE B. GOULD

By: /s/ THEODORE B. GOULD

**Theodore B. Gould,
General Partner**

**SCHEDULE A
TO
HYPOTHECATION AND SECURITY AGREEMENT**

1. All right, title and interest of Gould in and to the Theodore B. Gould Special Deposit Account #40-7720 and the Theodore B. Gould Special Safekeeping Account #916838 maintained at The Bank of New York including all funds at any time deposited in said accounts and any investments and reinvestments of the funds deposited from time to time in said accounts and all interest, dividends, accumulations and other earnings on said funds or said investments.

2. All right, title and interest of Gould (including any entity in which Gould has or obtains an interest) to distributions, as a general and/or limited partner, from 1300 North 17th Street Associates, including distributions which may be available as the result of:

(a) the funding by Metropolitan Life Insurance Company (Weaver Bros., Inc.) of its "Maximum Top Loan", as defined in its commitment dated April 10, 1978, as amended, and

(b) the retirement of certain indebtedness due to American Security Bank, N.A. secured by a Certificate of Deposit in the amount of \$5,000,000 issued by American Security Bank, N.A.,

subject in each case to the prior rights of American Security Bank, N.A.

3. 80,000 shares of stock of Holywell Corporation in the name of Theodore B. Gould representing 80% of the issued and outstanding shares of stock of Holywell Corporation which shares are presently pledged to Manufacturers National Bank of Detroit and/or Mr. Andrew Kalman as security for a letter of credit in the amount of \$4,000,000.

4. All right, title and interest of Gould (or any entity in which Gould has or obtains an interest) to distributions, as a general and/or limited partner, from 1333 New Hampshire Associates, which partnership owns certain real property located at 1333 New Hampshire Avenue, Washington, D.C., subject to any claim of The George Hyman Construction Company, Manufacturers National Bank of Detroit or Mr. Andrew Kalman.

5. All right, title and interest of Gould (or any entity in which Gould has or obtains an interest) to distributions, as a general and/or limited partner, from Eleven Dupont Circle Associates, which partnership owns certain real property located at 11 Dupont Circle, Washington, D.C., subject to any claim of The George Hyman Construction Company, Manufacturers National Bank of Detroit or Mr. Andrew Kalman.

6. All right, title and interest of Gould (or any entity in which Gould has or obtains an interest) to distributions, as a general and/or limited partner, from 1616 Reminc Limited Partnership, which partnership owns certain real property located at 1616 North Fort Myer Drive, Arlington, Virginia, subject to any claim of The George Hyman Construction Company, Manufacturers National Bank of Detroit or Mr. Andrew Kalman.

MIAMI CENTER LIMITED PARTNERSHIP
300 MIAMI CENTER
100 CHOPIN PLAZA
MIAMI, FLORIDA 33131
(305) 374-6102

November 17, 1982

The Bank of New York
48 Wall Street
New York, New York 10015

Attention: Mr. James A. Hamilton,
Vice President

RE: Miami Center,
Miami, Florida

Dear Mr. Hamilton:

Reference is made to that certain Hypothecation and Security Agreement dated May 14, 1981 among Theodore B. Gould ("Gould"), Miami Center Limited Partnership ("Borrower") and The Bank of New York ("Lender") a copy of which is attached hereto as Exhibit A (the "Security Agreement").

By the terms of the Security Agreement Gould hypothecated certain personal property, as described in Schedule A to the Security Agreement (the "Collateral"), to the Borrower and the Borrower assigned, pledged and granted a continuing first priority security interest in, and a lien on, all of Borrower's right, title and interest in and to the Collateral in favor of Lender as security for Borrower's Obligations, subject only to certain encumbrances as specified in said Schedule A.

We wish to confirm that: (1) the term Obligations, as used in the Security Agreement, encompasses Borrower's and Chopin Associates' ("Chopin") obligations under (i) the

\$24,000,000 Note dated May 26, 1982 made by Borrower and Chopin to Lender and the \$24,000,000 Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement, recorded in the Clerk's Office in Dade County, Florida, May 28, 1982 under Clerk's File No. 82R-120879 in O. R. Book 11454, Page 1129, securing said \$24,000,000 Note; and (ii) the \$11,000,000 Note and Confirmatory Note dated as of August 27, 1982 made by Borrower and Chopin to Lender and the \$11,000,000 Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement recorded in the Clerk's Office in Dade County, Florida, September 27, 1982 under Clerk's File No. 82R-219551 in O. R. Book 11568, Page 1370, securing said \$11,000,000 Note and Confirmatory Note; and (2) that the term Obligations shall encompass any and all obligations of Borrower and/or Chopin pursuant to any Note(s) and Mortgage(s) which may hereafter be given by Borrower and/or Chopin to Lender.

Further, we wish to confirm that a default by Borrower or Chopin, under and as defined in the Notes and Mortgages set forth in the preceeding paragraph or under and as defined in any Note(s) and Mortgage(s) given by Borrower and/or Chopin to Lender in the future, shall constitute an Event of Default under the Security Agreement entitling Lender to exercise the rights and remedies set forth in the Security Agreement.

Except as modified or changed herein, all other provisions of the Security Agreement shall remain in full force and effect.

All terms used herein which are defined in the Security Agreement shall have the same meanings herein, unless the context hereof otherwise requires.

Sincerely,

THEODORE B. GOULD

/s/ THEODORE B. GOULD

Theodore B. Gould, Individually

MIAMI CENTER LIMITED PARTNERSHIP

By: Miami Center Corporation,
General Partner

By: /s/ THEODORE B. GOULD

Theodore B. Gould, President

By: /s/ THEODORE B. GOULD

Theodore B. Gould,
General Partner

CHOPIN ASSOCIATES

By: Miami Center Corporation,
General Partner

By: /s/ THEODORE B. GOULD

Theodore B. Gould, President

By: /s/ THEODORE B. GOULD

Theodore B. Gould,
General Partner

FIRST AMENDMENT
TO
HYPOTHECATION AND SECURITY AGREEMENT

THIS FIRST AMENDMENT TO HYPOTHECATION AND SECURITY AGREEMENT ("First Amendment") dated as of the 20th day of January, 1983 to the Hypothecation and Security Agreement dated May 14, 1981 among Theodore B. Gould ("Gould"), Miami Center Limited Partnership ("Borrower") and The Bank of New York ("Lender") (the "Agreement").

W I T N E S S E T H:

WHEREAS, Lender is about to make a loan to Borrower and Chopin Associates ("Chopin") in an amount not exceeding \$8,000,000 or such lesser sum as Lender in its sole discretion may choose to lend (the "Loan"); and

WHEREAS, the Loan will be evidenced by a note dated January 20, 1983 in the aggregate principal amount of \$8,000,000 made by Borrower and Chopin to Lender, which note will be secured by a Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement dated January 20, 1983 by Borrower and Chopin to Lender; and

WHEREAS, Lender has indicated that it will not make the Loan unless Gould and Borrower execute and deliver this First Amendment to Lender; and

WHEREAS, in order to induce Lender to make the Loan Borrower and Gould have agreed to execute and deliver this First Amendment to Lender;

NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Borrower and Gould hereby agree as follows:

1. The third line of Section 4 of the Agreement shall be amended in its entirety to read as follows:

"tained with Lender all funds, including, without limitation, all distributions, judgments and awards payable to Gould pursuant to, or arising out of, a"

2. There shall be added to Schedule A of the Agreement, immediately following paragraph 6, the following paragraphs:

"7. All right title and interest of Gould (or any entity in which Gould has or obtains an interest) to funds or distributions resulting from any rental, lease, assignment, sale, transfer or refinancing of all or any part of the Condominium Parcel and/or Blocks 2, 3 and 4 of DuPont Plaza, all as more particularly described in Exhibit A attached hereto, including all improvements thereon."

"8. All right, title and interest of Gould (or any entity in which Gould has or obtains an interest) in and to all furniture, fixtures, equipment and other personal property owned or to be owned by Gould (or any entity in which Gould has or obtains an interest) and used or intended to be used in connection with the Premises ("FF&E"), including, without limitation, the FF&E to be leased by Gould and Holywell Telecommunications Company ("HTC") to Borrower including all rental payments due under any such lease.

3. There shall be added to the Agreement Exhibit A attached hereto.

4. For purposes hereof, HTC hereby hypothecates to Gould all of its right, title and interest in and to all FF&E owned or to be owned by it for the purpose of enabling Gould to hypothecate same to Borrower under the Agreement as amended by this First Amendment.

5. Gould hereby ratifies and confirms his hypothecation to the Borrower of all of his right, title and

interest in and to the Collateral and the Borrower hereby ratifies and confirms its assignment and grant of security interest to the Lender in and to the Collateral.

/s/ THEODORE B. GOULD

Theodore B. Gould

MIAMI CENTER LIMITED PARTNERSHIP

By: Miami Center Corporation,
General Partner

By: /s/ THEODORE B. GOULD

Theodore B. Gould,
President

By: /s/ THEODORE B. GOULD

Theodore B. Gould,
General Partner

HOLYWELL TELECOMMUNICATIONS
COMPANY

By: /s/ THEODORE B. GOULD

EXHIBIT A

All of Tract D, Block 1, DUPONT PLAZA, according to the Plan thereof, as recorded in Plat Book 50, at Page 11 of the Public Records of Dade County, Florida, LESS the following described property:

Being that portion of Tract D, Block 1, DUPONT PLAZA, according to Plat thereof, as recorded in Plat Book 50, at Page 11 of the Public Records of Dade County, Florida, being more particularly described as follows:

Being at the Northeast corner of said Tract D and run West along the North line of Tract D for 645.94 feet to a Point of Curvature; thence Southwesterly along a circular curve to the left having a radius of 25.00 feet and a central angle of 61 degrees 26 minutes 00 seconds for an arc distance of 26.81 feet to a Point of Compound Curvature; thence Southerly along a circular curve to the left having a radius of 300.00 feet and a central angle of 28 degrees 34 minutes 00 seconds for an arc distance of 149.57 feet to a Point of Tangency; thence South for 293.50 feet (said last mentioned four courses being coincident with the boundary lines of said Tract D); thence East for 179.41 feet; thence North for 150.00 feet; thence East for 525.36 feet; thence North for 0 degrees 04 minutes 07 seconds West along the East line of said Tract D for 300.00 feet to the Point of Beginning, lying and being in the City of Miami, Dade County, Florida.

Lots 1 through 8, both inclusive, in Block 2 (being the whole of said Block 2), of DUPONT PLAZA, according to the Plat thereof, as recorded in Plat Book 50, at Page 11, of the Public Records of Dade County, Florida.

Blocks 3 & 4 of DUPONT PLAZA according to the plat thereof, recorded in Plat Book 50, Page 11, of the Public Records of Dade County, Florida.

**SECOND AMENDMENT
TO
HYPOTHECATION AND SECURITY AGREEMENT**

THIS SECOND AMENDMENT TO HYPOTHECATION AND SECURITY AGREEMENT ("Second Amendment") dated as of the 23rd day of June, 1983 to the Hypothecation and Security Agreement dated May 14, 1981, as modified by a certain letter dated November 17, 1982 from Theodore B. Gould, Miami Center Limited Partnership and Chopin Associates to The Bank of New York and as amended by the First Amendment to the Hypothecation and Security Agreement dated January 20, 1983 among Theodore B. Gould ("Gould"), Miami Center Limited Partnership ("Borrower") and The Bank of New York ("Lender") as amended by First Amendment to Hypothecation and Security Agreement dated January 20, 1983 (the "as so modified and amended Agreement").

W I T N E S S E T H:

WHEREAS, Lender is about to make a loan to Borrower and Chopin Associates ("Chopin") in an amount not exceeding \$5,300,000 or such lesser sum as Lender in its sole discretion may choose to lend (the "Loan"); and

WHEREAS, the Loan will be evidenced by a note dated June 23, 1983 in the aggregate principal amount of \$5,300,000 made by Borrower and Chopin to Lender, which note will be secured by, among other things, a Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement dated June 23, 1983 by Borrower and Chopin to Lender; and

WHEREAS, Lender has indicated that it will not make the Loan unless Gould and Borrower execute and deliver this Second Amendment to Lender; and

WHEREAS, in order to induce Lender to make the Loan Borrower and Gould have agreed to execute and deliver this Second Amendment to Lender;

NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Borrower and Gould hereby agree as follows:

1. There shall be added to Schedule A of the Agreement, immediately following paragraph 8, the following paragraph:

“9. All right title and interest of Gould (or any entity in which Gould has or obtains an interest) to any and all property, real or otherwise, resulting from or arising out of any judgment or award made in the arbitration between Gould and Olympia & York entitled, “In the Matter of the Arbitration between Theodore B. Gould, Claimants, and Olympia & York Florida Equity Corporation and O & Y Equity Corporation, Respondents, American Arbitration Association Tribunal No. 13-115-0547-82.”

2. There shall be added to Section 5 of the Agreement, immediately following subparagraph (k), the following subparagraph:

(1) Neither Gould (nor any entity in which Gould has or obtains an interest) shall transfer, sell or in any manner dispose of, any property, real or otherwise, referred to in paragraph 8 of Schedule A.

3. Gould hereby ratifies and confirms his hypothecation to the Borrower of all of his right, title and interest in and to the Collateral and the Borrower hereby ratifies and confirms its assignment and grant of security interest to the Lender in and to the Collateral.

/s/ THEODORE B. GOULD

Theodore B. Gould

MIAMI CENTER LIMITED PARTNERSHIP

By: Miami Center Corporation,
General Partner

By: /s/ THEODORE B. GOULD

Theodore B. Gould,
President

By: /s/ THEODORE B. GOULD

Theodore B. Gould,
General Partner

EXHIBIT "B"

ASSIGNMENT AND SECURITY AGREEMENT

THIS ASSIGNMENT, made this 23rd day of June, 1983 by HOLYWELL CORPORATION, a Delaware corporation having its principal offices at 1300 North 17th Street, Arlington, Virginia 22209 (the "Company") to THE BANK OF NEW YORK, a New York banking corporation having its principal offices at 48 Wall Street, New York, New York 10015 (the "Bank") (the "Agreement").

WHEREAS, pursuant to a certain Building Loan Agreement, dated as of March 27, 1980, as amended, by and between Miami Center Limited Partnership ("MCLP") and Charter Mortgage Company ("Charter") (the "BLA"), which BLA was assigned by Charter to the Bank, and pursuant to a certain Land Loan Agreement, dated as of March 27, 1980, as amended, by and between Chopin Associates ("Chopin") and Charter (the "LLA"), which LLA was assigned by Charter to the Bank, the Bank has made mortgage loans in the aggregate principal sum of \$173,500,000.00 to Chopin and MCLP for the purpose of funding the cost of acquisition of certain land located in Miami, Florida and the cost of construction of the improvements built or to be built (the "Improvements") on the Land and other costs in connection therewith (the "Construction Loan"); and

WHEREAS, Miami Center Corporation, a Florida corporation ("Miami Center Corp."), is a general partner of both MCLP and Chopin; and

WHEREAS, the Company is the owner of 100% of the issued and outstanding shares of capital stock of Miami Center Corp.; and

WHEREAS, pursuant to certain guarantees of payment made by the Company, Miami Center Corp. and Theodore B. Gould ("Gould") to the Bank (the "Guarantees"), the

Company has guaranteed the prompt payment when due of all principal and interest due on the Construction Loan; and

WHEREAS, MCLP is unable to complete construction of the Improvements as described in the BLA for the amount of the Construction Loan; and

WHEREAS, MCLP and Chopin have requested the Bank to make an additional loan to MCLP and Chopin in an amount not to exceed \$8,300,000 (the "Loan") which Loan shall be secured by, among other things, a mortgage or mortgages given by Chopin and MCLP on certain land and other property described therein, a Guarantee of Payment executed and delivered to the Bank by the Company, Gould and Miami Center Corp., and which Loan shall be evidenced by a Note or Notes given by MCLP and Chopin to the Bank (the "Note"); and

WHEREAS, the Bank has indicated that it will not make the Loan without this Agreement; and

WHEREAS, as security for the payment and performance of all of the obligations of the Company now or hereafter arising under the Guarantees of Payment of the Construction Loan and the Loan, executed and delivered by the Company to the Bank (the "Obligations") the Company wishes to assign to the Bank a continuing first priority security interest in the Collateral, as hereinafter defined.

NOW, THEREFORE, in consideration of the premises, the mutual covenants, terms and conditions herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company hereby covenants and agrees as follows:

1. *Definitions:* Unless the context hereof otherwise requires, the following terms shall have the following meanings, such definitions to be applicable equally to the singular and plural forms:

"Lien" shall mean any lien, mortgage, pledge, assignment, security interest, charge or other encumbrance of any kind, or the interest of a vendor or lessor under any conditional sale agreement, capital lease or other title retention agreement.

"Partnership Agreements" shall mean (a) the Agreement of Limited Partnership of 1300 North 17th Street Associates, as amended to date, (b) the Eleventh Dupont Circle Associates Agreement of Limited Partnership, as amended to date, (c) the 1616 Reminc Limited Partnership Limited Partnership Agreement, as amended to date, (d) the Agreement of Limited Partnership of 1333 New Hampshire Associates, as amended to date, (e) the Dupont Land Associates Agreement of Limited Partnership, as amended to date.

"Person" shall mean any individual, corporation, partnership, trust, governmental body, joint venture or other entity, whether acting in a fiduciary capacity or otherwise.

"Property" shall mean all personal, real or mixed property, tangible or intangible.

"Subsidiary" shall mean any corporation, association, partnership, joint venture or other business entity of which the Company and/or any subsidiary of the Company either (a) in respect of a corporation, owns any outstanding stock or (b) in respect of an association, partnership, joint venture or other business entity, is entitled to share in any of the profits and losses, however determined.

2. *Assignment and Grant of Security Interest:* As collateral security for the payment and performance of the Obligations, the Company hereby pledges, assigns and grants to the Bank a continuing first security interest in and to the following:

(a) all right, title and interest of the Company in and to the following securities, all of the which shall hereinafter

PURCHASE AGREEMENT

THIS AGREEMENT is made, effective for all purposes and in all respects as of the 11th day of February, 1985, by and between (i) Hadid Investment Group, Inc., Trustee (hereinafter sometimes "Purchaser"), and (ii) Miami Center Limited Partnership ("MCLP"), a Florida limited partnership, and Chopin Associates ("Chopin"), a Florida general partnership, (hereinafter sometimes collectively referred to as "Sellers").

WHEREAS, Chopin holds fee simple title to that tract or parcel of land situated in Dade County, Florida and described in Exhibit A annexed hereto as well as a Lessor's interest in that certain long-term Ground Lease dated March 27, 1980 (the "Ground Lease") and MCLP holds title to the improvements located on said parcel and a Leasehold interest in said parcel pursuant to the Ground Lease (such interest of Sellers hereinafter sometimes collectively referred to as "the Property"); and

WHEREAS, Purchaser desires to buy, and Sellers desire to sell the Property in accordance with the terms and conditions set forth herein:

1. *Agreement of Purchase and Sale.* Sellers hereby agree to sell and convey the Property and Purchaser hereby agrees to purchase the Property in accordance with the terms and provisions hereof.

2. *Terms and Payment.*

(a) *Purchase Price.* The purchase price shall be TWO HUNDRED SIXTY MILLION DOLLARS NET (\$260,000,000), payable as follows:

(b) *Deposit.*

(i) Purchaser will simultaneously with the execution hereof by all parties deposit with National Real Estate Title Company, as "Escrow Agent", the sum of FIVE

MILLION DOLLARS (\$5,000,000) as a "Deposit" hereunder in the form of a Promissory Note payable to Sellers upon the expiration of the "Study Period" under paragraph 3(e). The Deposit shall be applied as part payment of the cash portion of the purchase price when paid at Settlement. The Deposit is to be held by Escrow Agent until Settlement or until other disposition is made thereof as herein provided. At Purchaser's option, the Deposit may be in the form of an unconditional irrevocable letter of credit in form and substance and from a financial institution acceptable to Sellers. The initial Promissory Note shall be converted to a Deposit in the form of cash or such a letter of credit upon the expiration of the "Study Period".

(ii) The Deposit shall be invested in interest bearing securities to be selected by Purchaser, and interest earned thereon shall be paid to the party who ultimately receives the Deposit. Escrow Agent signs this Contract to evidence receipt of the Deposit and agrees to be bound by the terms hereof.

(c) The balance of the purchase price shall be paid in cash at closing, by wire transfer or other form of certified funds specified by Sellers.

(d) *Escrow for Uncompleted Tenant Fit-Up and Hotel Construction.* From the proceeds of the purchase price to be paid in cash at closing, there shall be deposited in escrow with the Title Company an amount reasonably estimated by Sellers to substantially complete in-process building standard finishes in the Pavillon Hotel, which fit-ups and finishes are currently being performed by Sellers (hereinafter the "Outstanding Finish Work"). The Escrow Agent shall invest the deposited sum for the benefit of Sellers, as directed by Sellers. Purchaser shall be entitled to apply the said funds in reimbursement for the actual and necessary costs of completing the Outstanding Finish Work after submitting a requisition to Sellers' architect for approval and then to the Escrow Agent. Upon the occurrence of the earlier of (i)

certification by Sellers' architect that the Outstanding Finish Work has been substantially completed or (ii) one year from closing, the Escrow Agent shall pay over free and clear to the Sellers the balance of all funds then being held in escrow.

3. *Settlement.*

(a) *Date.* Settlement in accordance with the terms thereof shall take place on or before August 15, 1985 (hereinafter the "Settlement Date" or "Closing Date"). Settlement shall take place at the office of Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey, 1120 Connecticut Avenue, NW, Washington, DC 20036, at 10:00 a.m. Settlement shall mean the execution of all documents contemplated hereby and the delivery of (i) the documents to those parties respectively entitled to the documents, and (ii) the documents to be recorded to the Title Company. The term "Settlement" shall be used interchangeably with the words "Closing", "settlement" and "closing". The parties may, by mutual agreement in writing, change the place, date or time of settlement.

(b) *Costs.* Examination of title to the property, documentary stamps on the deed, recording, notary fees, surveys, title insurance premiums, Title Company charges, if any, and all other settlement costs shall be at the expense of Sellers. Purchaser shall only be responsible for its own legal fees.

(c) *Deed.* At settlement, Sellers and any other necessary person shall deliver to Purchaser a good and sufficient special warranty deed, duly executed and acknowledged by all parties deemed necessary by the Title Company, conveying the Property.

(d) *Tender of Performance.* It shall be a good and sufficient tender of performance of the terms hereof by either of the parties if such party deposits with the Title Company originals of the documents to be executed by such party.

(e) As long as it does not interfere with the normal operation of the Property, Sellers will give Purchaser, its architects, engineers, attorneys, accountants and other consultants or representatives, during normal business hours and as often as may be reasonably requested until May 12, 1985 (the "Study Period") full access to the Property to make engineering studies and the like, and will furnish to Purchaser all documents and information concerning the Property which Purchaser shall reasonably request, including all such documents, financial statements and books and records pertaining to the operation of the Property. In the event that the studies or other investigations are not satisfactory to Purchaser, Purchaser shall have the right to terminate this Agreement on or before the expiration of the Study Period, the deposit referred to in paragraph 2(b) above shall be returned immediately to Purchaser, and thereafter Sellers and Purchaser shall be released of any further liability to the other. In the event Sellers have not provided an acceptable Title Report, as described in paragraph 5(b)(iv) prior to May 12, 1985, Purchaser shall have the right, upon written notice, to extend the expiration of the Study Period until September 12, 1985, in which event the Closing Date shall also be extended until September 12, 1985.

4. Default.

(a) If Purchaser shall fail to settle on the Settlement Date in accordance with the provisions hereof, for any reason whatsoever other than Sellers' failure or refusal to settle hereunder, or Sellers' inability to comply with their obligations hereunder, then and in that event damages being unascertainable, the Deposit shall be forfeited, this Agreement shall be null and void, and neither Purchaser nor Sellers shall have any further liability hereunder, retention of the Deposit being Sellers' sole remedy.

(b) If Purchaser shall tender performance but due to Sellers' failure or refusal to settle, settlement does not occur at the appointed date and time, Purchaser shall have the

right to the remedy of specific performance or a return of the Deposit; Purchaser shall not have the right to a suit for damages, in the event the Purchaser elects the return of the Deposit, then this contract shall be null and void and neither Purchaser nor Sellers shall have any further liability hereunder, a return of the Deposit being Purchaser's sole remedy.

5. *Conditions Precedent to Purchaser's Obligation.* Purchaser's obligation to make settlement hereunder is subject to the satisfaction of the following conditions, any of which may be waived by Purchaser, at the time of settlement.

(a) *Warranties.* The covenants, warranties and representations made by Seller in paragraph 10 hereof, and elsewhere in this Agreement, shall be true and correct.

(b) *Title to the Property.* Fee simple title good of record and in fact to the Property, subject to the provisions of paragraph 9, shall be in the Sellers. The Seller shall:

(i) Be the owner of record and in fact, legally and beneficially of the aforementioned property;

(ii) Have the rights to transfer the Property owned by it without the agreement of any other person;

(iii) Have fee simple title to the Property owned by it that is good and marketable, insurance at standard rates on the latest standard American Land Title Association owner's policy form B; and

(iv) Purchaser shall immediately order a title report on the Property by a title company located in Miami, Florida (the "Title Company") of Purchaser's choice. Anything in this Agreement to the contrary notwithstanding at any time during the period thirty (30) days after Purchaser receives such title report, Purchaser may notify Seller that title to the Property is not acceptable, whereupon this Contract shall be terminated, Purchaser shall be entitled to

the immediate return of the Deposit and Seller and Purchaser shall have no further liability hereunder; provided that, any condition which is specified in paragraph 5 hereof, or which is noted on the list of "Permitted Exceptions" attached as Exhibit B hereto, or which may be removed or discharged by payment of the Purchase Price shall not be considered an unacceptable condition. If Purchaser does not so notify Sellers within the said thirty (30) day period, Purchaser shall be deemed to have accepted title as shown on the aforesaid title report.

(c) If at the date of closing title is not in the exact condition described in the title report ordered and accepted by Purchaser, Purchaser shall have the right to declare this contract null and void and receive a return of its Deposit.

(d) Sellers shall have no obligations as of the Settlement Date under any hotel Management and Operating Agreement for the Pavillon Hotel.

(e) *Specified Conditions Not Present.* At closing, Sellers shall have no knowledge of, and there shall not be any:

(i) Proposed or pending proceedings to modify the zoning classification of, to condemn, or purchase in lieu thereof, all or any substantial part of any of the Property.

(ii) Commitments made by Seller to any governmental or quasi-governmental authority, or other third party to dedicate or grant any portion of any of the Property for any public or semi-public purpose or to incur any other obligation or expense respecting the Property, except those disclosed in the Ball Point Development Order, as the same was amended and is to be amended, unless Purchaser has consented specifically thereto in writing.

(iii) Any other impediments which will significantly interfere with Purchaser's use or disposition of the Property.

(f) *Remedies of Purchaser.* If any condition of Purchaser's obligation to conclude settlement is not satisfied, Purchaser shall have the right, to be exercised not later than the date of Settlement, either to (i) proceed to Settlement, or (ii) terminate this Agreement, whereupon the Deposit shall be immediately returned to Purchaser.

6. *Liens and Encumbrances.* The premises are sold and are to be conveyed subject to:

(a) Zoning and building regulations, ordinances, and requirements adopted by any government or municipal authority having jurisdiction thereof, and amendments and additions thereto nor or hereafter in force and effect, which relate to the premises.

(b) Any state of facts as shown on the survey provided to Purchaser by Sellers.

(c) Rights of tenants under and subject to existing leases with such tenants, which have been exhibited to the Purchaser and examined by the Purchaser, and the Purchaser hereby approves the forms and terms thereof, and such other new tenancies as are permitted in this contract. The Purchaser assumes the obligations of the landlord under such leases after delivery of the deed, and agrees to hold the Sellers harmless from any claims in connection with such leases arising after delivery of the deed; and further agrees that this assumption and indemnity shall survive the closing of title.

7. *Past Due Rent.* If any past due rentals (including "Additional Rent" charges under the leases) are owing by tenants at the time of closing of title and to all or part of such past due rentals are attributable to the period of time prior to closing, the first moneys received by the Purchaser from the tenants owing such past due rentals shall be received by the Purchaser as trustee for the Sellers on account or in payment of such past due rentals, and the Purchaser shall remit forthwith to the Sellers the amount of such past due

rentals to which the Sellers are entitled, so collected, out of the first moneys received by the Purchaser, provided, however, that the Purchaser shall have the right to deduct therefrom any collection fees. This provision shall survive delivery of the deed.

8. *Items to be Apportioned.* The following are to be apportioned as of the date of the delivery of the deed:

(a) Rents as and when collected.

(b) Premiums on existing transferable insurance policies or renewals of those expiring prior to closing.

(c) Real estate taxes and sewer rents, if any, on the basis of the fiscal year for which assessed. If the closing of the title shall occur before the tax rate is fixed, the apportionment of taxes shall be upon the basis of the tax rate for the next preceding year applied to the latest assessed valuation.

(d) Water and other utility charges. If there is a water meter or other meter on the premises, any unfixed meter charges and unfixed sewer rents, if any, shall be apportioned on the basis of the last reading.

9. *Outstanding Security Interests.* If on the date of closing there shall be financing statements which were filed on a day more than three years prior to closing of title, these shall not be deemed to be an objection to title, provided the Sellers execute and deliver to the Purchaser an affidavit setting forth that the property covered by such financing statements is no longer in the premises; or if such property still is in the premises, that such property has been fully paid for. Financing statements or other encumbrances, although filed against the premises but affecting a tenant or which are the obligation of any tenant, shall be no objection to title.

10. *Representations and Warranties of Sellers.* Sellers jointly and severally warrant and represent the following,

which are true and correct and shall be true and correct as of the Settlement Date, and shall survive closing hereunder.

(a) *Authority.* The Sellers have full power and authority to enter into this Agreement and to assume and perform all of their obligations thereunder.

(b) All public utilities required for the operation of the Property, or any part thereof, either enter the Property through adjoining public streets or if they pass through adjoining private land do so in accordance with valid public easements or private easements which will inure to the benefit of Purchaser.

(c) There are no pending or threatened assessment, condemnation or eminent domain proceedings which would affect the Property, or any substantial part thereof.

11. *Condemnation.* If, prior to the Closing Date, condemnation or eminent domain proceedings shall be commenced by any competent public authority against the Property or any substantial part thereof, Sellers shall promptly give Purchaser written notice thereof. After notice from Sellers of the commencement of any such proceedings and in the event that the taking of such property shall materially interfere with the operation of the Property, Purchaser shall have the right (i) to accept the Property subject to the proceedings, whereupon any award shall be paid to Purchaser, and Sellers shall deliver to Purchaser at Closing all assignments and other documents reasonably requested by Purchaser to vest such award in Purchaser or (ii) to rescind this Agreement and neither party will have any further obligations hereunder.

12. *Documents at Closing.* Sellers shall execute and deliver to Purchaser on the Closing Date, if Purchaser so requests:

(a) The Deed referred to above.

(b) An assignment (with assumption by Purchaser) of Sellers' interest in the Tenant Leases and the Ground Lease.

(c) An affidavit affirming that no work has been performed or materials supplied that could result in mechanic's liens on the Property.

13. *Sellers' Obligations Pending Closing.* Between the date hereof and the Closing Date Seller shall:

(a) Operate the hotel and office building on the Property in the same manner as prior to the date hereof.

(b) Comply with all state and municipal laws, ordinances, regulations, and orders relating to the Property.

(c) Promptly give written notice to Purchaser of the occurrence of any event materially affecting the substance of the representations made hereunder.

14. *Broker.* Each party warrants and represents that it has not engaged any agent or broker with respect to this transaction and agrees to hold harmless each other against such brokerage claims.

15. *Notices.* Any notices to be given hereunder shall be given in writing by mail, first class, postage prepaid, return receipt requested, or by delivery, addressed to:

(a) If to Sellers to:

Theodore B. Gould
300 Miami Center
100 Chopin Plaza
Miami, FL 33131

With a copy to:

Robert C. Nichols, Esq.
Kent, Watts & Durden
P.O. Box 4700
Jacksonville, FL 32201

(b) If to Purchaser to:

Hadid Investment Group, Inc., Trustee
c/o Mohammed A. Hadid, President
1655 North Fort Myer Drive
Arlington, VA 22209

With a copy to:

Mitchell Cutler, Esq.
Finley, Kumble, Wagner, Heine, Underberg,
Manley & Casey
1120 Connecticut Avenue, NW
Washington, DC 20036

or such other addresses as may be designated by the respective parties in writing. Any notices given pursuant to this paragraph shall be deemed given when received or delivered.

16. *Other Provisions.*

(a) *Binding Effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and the heirs, successors, legal representatives and assigns of the respective parties.

(b) *Governing Law.* This Agreement shall be construed and enforced in accordance with the laws of the State of Florida.

(c) *Headings.* The captions and headings herein are for convenience and reference only and in no way define or limit the scope or content of this Agreement or in any way effect its provisions.

(d) *Exhibits.* The Exhibits which are attached hereto are hereby made a part of this Agreement as fully as if set forth in the text of this Agreement.

(e) *Entire Agreement.* This Agreement and the Exhibits attached hereto contain the final and entire

Agreement between the parties hereto with respect to the matters set forth hereby, and are intended to be an integration of all prior negotiations and understandings. No change or modification of this Agreement shall be valid unless the same is in writing and signed by the parties hereto. No waiver of any of the provisions of this Agreement shall be valid unless the same is in writing and is signed by the party against which it is sought to be enforced.

(f) *Gender.* The use of any gender herein shall be deemed to be or include the other gender and the use of the singular herein shall be deemed to be or include the plural and vice versa, wherever appropriate.

17. *Bankruptcy Court Approval.* Notwithstanding the provisions contained herein, the obligations of the parties hereto are expressly conditioned upon a determination and the issuance of a final order (the "Final Order") that Sellers, as Debtors in Possession, have the authority to (i) execute this Contract and (ii) close on the transaction contemplated by this Contract.

"Final Order" shall mean (i) the entry of an order by the United States Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Court"), assuming the Bankruptcy Court has jurisdiction to render such an order, and, if not, the United States District Court for the Southern District of Florida (the "District Court"), and (ii) the running of time period within which an appeal may be taken from the entry of such order by the Bankruptcy Court or District Court, respectively, without such an appeal being taken, or the exhaustion of all appeals from such order of the Bankruptcy Court or District Court, respectively, provided that such appeals result in the approval of the Bankruptcy Court's or District Court's, respectively, order.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals effective for all purposes and in all respects as of the day and year first above written.

SELLERS:

Signed, sealed and delivered
in the presence of:

MIAMI CENTER LIMITED
PARTNERSHIP, a Florida
limited partnership

[illegible]

By [illegible]
General Partner

CHOPIN ASSOCIATES,
a Florida limited
partnership

/s/ Yvonne Page

By [illegible]
Partner

PURCHASER:

HADID INVESTMENT
GROUP, INC., Trustee

[illegible]

By [illegible]
President

[illegible]

DEPOSIT ACCEPTED:

NATIONAL REAL ESTATE
TITLE CORPORATION

By [illegible]

EXHIBIT "A"

LEGAL DESCRIPTION

Being that portion of Tract D, Block 1, "du Pont Plaza" according to the plat thereof as recorded in Plat Book 50 at Page 11 of the Public Records of Dade County, Florida, being more particularly described as follows:

Begin at the Northeast corner of said Tract "D" and run West along the North line of Tract "D" for 645.94 feet to a Point of Curvature; thence Southwesterly along a circular curve to the left having a radius of 25.00 feet and a central angle of 61 degrees 26 minutes 00 seconds for an arc distance of 26.81 feet to a Point of Compound Curvature; thence Southerly along a circular curve to the left having a radius of 300.00 feet and a central angle of 28 degrees 34 minutes 00 seconds for an arc distance of 149.57 feet to a Point of Tangency; thence South for 293.50 feet (said last mentioned four courses being coincident with the boundary lines of said Tract "D"); thence East for 179.41 feet; thence North for 150.00 feet; thence East for 525.36 feet; thence North 0 degrees 04 minutes 07 seconds West along the East line of said Tract "D" for 300.00 feet to the Point of Beginning, lying and being in the City of Miami, Dade County, Florida.

EXHIBIT "B"

Permitted Exceptions

1. Taxes for the year 1985 and subsequent years.
2. That portion of the Property lying seaward of the steel sheet piling as shown on that certain Sketch of Survey prepared by Schwebke-Shiskin & Associates, Inc., dated February 14, 1979, at File No. AJ-1485 (the "Sketch of Survey").
3. The following matters as shown in the Sketch of Survey:
 - (a) Overhead wires;
 - (b) Light poles; and
 - (c) Storm sewers.
4. Any and all rights of the United States government with respect to control over navigable waters for purposes of navigation, commerce, recreation and fisheries.
5. The parties acknowledge and agree that title to the Property is presently subject to that certain Grant of Easement and Declaration of Restrictions among Chopin Associates, Miami Center Limited Partnership and Miami Center Joint Venture, dated May 14, 1981 and recorded May 15, 1981 under Clerk's File No. 81R-131532 and in Official Records Book 11102, Page 2247, of the Public Records of Dade County, Florida.

Exhibit "B"
to the Plan of Reorganization

Notwithstanding the language of Article V of the Plan, Debtor is making no election, as of the filing of the Plan, to reject or assume specific executory contracts and expressly reserves the right to assume or reject any executory contract until the time of confirmation of a plan pursuant to §365(d) of the Bankruptcy Code.

Exhibit "B"
HOLYWELL CORPORATION
BALANCE SHEET
DECEMBER 31, 1983

ASSETS

INVESTMENTS

Subsidiary Corporations, Net	\$ 1,150
Affiliated Partnerships	426,399
	<u>\$ 427,549</u>

OTHER ASSETS

Advances and interest receivable from affiliated partnerships	3,306,372
Loan receivable—Officer	2,218,613
Mortgage notes receivable	153,909
Accounts receivable	89,056
Furniture and equipment, net	88,143
Prepaid items	4,782
	<u>\$5,860,875</u>
	\$6,288,424

LIABILITIES

Accounts Payable	\$ 698,830
Notes payable	1,750,000
Payroll taxes	20,574
Cash deficit	39,972
Advances from subsidiary corps.	610,516
	<u>\$3,119,892</u>

STOCKHOLDERS' EQUITY

Common stock	\$ 10,100
Capital in excess of par	110,186
Retained earnings	3,048,246
	<u>\$3,168,532</u>
	\$6,288,424

Exhibit "C"
HOLYWELL CORPORATION
PRO FORMA BALANCE SHEET
FEBRUARY 15, 1985

ASSETS

INVESTMENTS

Twin Development Corp.—Cash	\$13,128,533
Other subsidiary corps.—Washington	550,000
Other subsidiary corps.—Miami	9,168,000
Affiliated partnerships—1300	925,000
—MCLP	<u>5,250,000</u>
	\$29,021,533

OTHER ASSETS

Cash	\$15,110,000
Advances and interest receivable—MCLP	4,080,000
Loans and interest receivable—Officer	2,015,000
Note receivable—MCLP	490,000
Mortgage note receivable	50,000
Accounts and interest receivable	183,000
Furniture and equipment, net	<u>64,400</u>
	\$21,992,400

TOTAL ASSETS	\$51,013,933
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LIABILITIES

Accounts Payable	\$ 900,000
Notes payable—1300	380,000
Notes and interest payable—BNY	<u>2,015,000</u>
	\$ 3,295,000

NET EQUITY	\$47,718,933
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Exhibit "D"

PENDING LITIGATION

v.

HOLYWELL CORPORATION

ASSOCIATED CONCRETE INDUSTRIES v. MCLP, et al., Dade County Circuit Court, Case No. 83-23108 (08).

Plaintiff brought this action to foreclose its lien for painting stripes in the parking garage in the total amount of \$27,339.00. After filing, plaintiff was paid \$15,000, and it appears that the balance is due. The case is still at the motion to dismiss state, but it appears from the files that the defendant should be Holywell Construction, not Holywell Corporation.

FEDERAL EXPRESS v. HOLYWELL CORP., Dade County Court, Case No. 84-11729-CC-05.

Plaintiff claims \$3,456.79 is owed for services rendered, and although the matter was filed shortly before the bankruptcy and thus no discovery has occurred, the amount claimed appears correct.

TIME EQUIPMENT OF MIAMI v. MCLP and HOLYWELL CORP., Dade County Court, Case No. 83-24425-CC-05.

This is an action seeking recovery of \$1,820.00. Based upon the documents available, the purchase order was executed by MCLP, but plaintiff's records show the purchaser as Holywell Corp. The amount claimed, however, is accurate.

VALDES-FAULI COBB & PETRY v. MCLP, THEODORE B. GOULD, HOLYWELL CORP., MCJV, CHOPIN ASSOC., Dade County Circuit Court, Case No. 84-16151.

This is an action for legal fees in the amount of \$42,333.24 against all of the above entities. The full

amount appears to be owed, but pending discovery (the action was filed shortly before the bankruptcy proceedings) it has not yet been determined which of the defendants is responsible for which bills. It does appear from the attachments to the complaint that the services were performed primarily for the Miami Center Joint Venture, not Holywell.

XEROX v. HOLYWELL CORP., Dade County Court, Case No. 84-13640-CC-05.

Plaintiff's action seeks recovery of \$4,640.93 as amounts due for the leasing of certain equipment. The complaint was served on August 9, 1984, and thus no answer was filed. It does not appear from preliminary investigation that the amount claimed is correct, but as yet, we have been unable to determine what, if anything, is owed.

TRANSPORTS CLEARING EAST, INC. v. HOLYWELL CORP., General District Court for Arlington County, Virginia, Case No. C84-246.

Plaintiff brought this action seeking to recover \$2,622.16 for freight charges on delivery of certain furniture to Miami Center. In defense, Holywell responded that such charges are the responsibility of the manufacturer, Monarch Furniture. Holywell has made a demand on Monarch Furniture to pay such charges.

OBER, KALER, GRIMES & SHRIVER v. HOLYWELL CORP. & WHITEHALL SECURITY CORP., U.S. District Court for the District of Maryland, Case No. JH84-3007.

This is an action seeking recovery on a promissory note which reflected the amounts owed for legal services. Defendants do not dispute that payment is due for the amount of \$92,790.83, the amount of the note. However, no responsive pleadings have been filed due to the bankruptcy proceeding.

CHAS. G. STOTT & CO., INC. v. HOLYWELL CORP.,
General District Court for Fairfax County, Virginia, Case
No. 84-6394.

Plaintiff brought this action seeking \$989.20 for non-payment for office goods supplied on an open account. Holywell filed a motion to dismiss objecting to venue and stating that the proper defendant is Holywell Construction Company. The Chapter 11 proceeding stayed any further action. Plaintiff, though, filed a new warrant to which a response is due by April 10, 1985 in which Holywell Construction Company is the named defendant.

NATIONAL MICRO. PRODUCTS, INC. v. HOLYWELL CORP., et al., Circuit Court of Chesterfield County, Virginia, Case No. 198-84.

This is an action for alleged contract fees in the amount of \$208,981.41 relating to the design and furnishing of electronic equipment. Defendants filed a demurrer and objection to venue before the Chapter 11 proceeding in venue. Defendants vigorously dispute plaintiff's claim and plan to pursue, in the appropriate forum, claims against plaintiff for substantial amounts owed to debtor entities.

RICHARD H. PLEHN, INC. v. HOLYWELL CORP., et al., U.S. District Court for the Eastern District of Virginia, Case No. 84-0829-A.

This is a claim for payment of brokerage commissions for two different transactions. It is not disputed that plaintiff is owed the debt reflected in a promissory note in the amount of \$336,742.00 plus interest at 10%, unless such claim is invalidated by plaintiff's filing of its second claim for \$240,000.00, which is disputed in its entirety. The bankruptcy proceeding has stayed any action in this case.

Exhibit "E"

HOLYWELL CORPORATION (DEBTOR IN POSSESSION) LIQUIDATION ANALYSIS FEBRUARY 15, 1985

	ASSETS (2/15/85)	LIQUIDATION VALUE
1. Cash	\$15,110,000	\$15,110,000
2. Advances due from MCLP	4,080,000	0
3. Loans due from Officer	2,015,000	0
4. Note due from MCLP	490,000	490,000
5. Mortgage note due (Charleston)	50,000	50,000
6. Accounts receivable	183,000	170,000
7. Furniture and equipment, net	64,400	20,000
8. Investments—Twin Development Corp.	13,128,533	13,128,533
9. Investments—Washington subsid. corps.	550,000	550,000
10. Investments—Miami subsid. corps.	9,168,000	0
11. Investments—Affiliated ptns.—1300	925,000	0
12. Investments—Affiliated ptns.—MCLP	5,250,000	0
TOTAL LIQUIDATION VALUE	\$51,013,933	\$29,518,533
PRIORITIES (2/15/85)		
1. Secured debt	\$ 2,015,000	\$ 2,015,000
2. Estimated costs and expenses of liquidation	150,000	150,000
3. Post-petition priority creditors	20,000	20,000
4. IRS—corp. taxes		15,000,000
TOTAL PRIORITIES	\$ 2,185,000	\$17,185,000
TOTAL AVAILABLE FOR DISTRIBUTION TO UNSECURED CREDITORS	\$48,828,933	\$12,333,533

[This Liquidation Analysis is qualified by and should be read in conjunction with the notes that follow it.]

**HOLYWELL CORPORATION
(DEBTOR IN POSSESSION)
NOTES TO LIQUIDATION ANALYSIS
FEBRUARY 15, 1985**

A. ASSET LIQUIDATION VALUE

Values shown are based on the company's estimation that on forced liquidation, the Company's assets would produce the following percentage of recovery:

Cash	100%
Advances, loans and other due from MCLP	9%
Accounts and mortgages receivable	94%
Investments—Washington subsidiary corps.	100%
Personal property	31%

B. BOOK VALUE OF INVESTMENTS—WASHINGTON SUBSIDIARY CORPS.

The book value for wholly owned Washington, D.C. based subsidiary corporations is based on the net realizable value of receivables due to the corporations by independent third parties.

C. AMOUNT OF SECURED DEBT

The amount of secured debt shown involves interest, all of which is due to the Bank of New York.

D. SECURED DEBT GUARANTEES AND CONTINGENCIES

The Miami Center Limited Partnership and Chopin Associates construction and land loan of \$195,086,028 and accrued interest of approximately \$30,492,880 are secured by (1) first deeds of trust on the land and leasehold; (2) substantially all the assets of Holywell Corporation; and (3) the personal guarantee of Theodore B. Gould.

APPENDIX G

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NOS.

84-01590-BKC-TCB

84-01591-BKC-TCB

84-01592-BKC-TCB

84-01593-BKC-TCB

84-01594-BKC-TCB

Proceedings in Chapter 11

In re:

HOLYWELL CORPORATION, et al.,

Debtors.

**AMENDED CONSOLIDATED DISCLOSURE
STATEMENT AND PLAN OF REORGANIZATION OF
HOLYWELL CORPORATION, MIAMI CENTER
LIMITED PARTNERSHIP, CHOPIN ASSOCIATES,
MIAMI CENTER CORPORATION AND THEODORE B.
GOULD PROPOSED BY THE BANK OF NEW YORK**

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AMENDED CONSOLIDATED DISCLOSURE STATEMENT

This Amended Disclosure Statement is submitted on behalf of The Bank of New York ("BNY") in support of its Consolidated Plan of Reorganization ("BNY's Plan"). BNY's Plan, dated February 26, 1985, as amended, is on file with the Bankruptcy Court and a copy is annexed hereto as Exhibit 1.

BNY is the major secured creditor of each of the Debtors. The Debtors are indebted to BNY, under direct and guarantee obligations, in the amount of approximately \$234,342,743 as of March 14, 1985, which amount does not include expenses of approximately \$1,611,563 to March 14, 1985. Interest and expenses are currently accruing at a rate of approximately \$2,300,000 per month. BNY holds, as security for the indebtedness, *inter alia*, first mortgages on Miami Center, which has an appraised value of \$255,600,000 and a first security interest in approximately \$32,422,798 in cash. Under BNY's Plan, which contemplates a substantive consolidation of the estates and a liquidation of the assets, BNY will purchase Miami Center for \$255,600,000, within 45 days from the Effective Date. Upon such purchase, BNY will release all other collateral that it holds as security for the BNY Debt, including its security interest in the \$32,422,798 in cash, subject, however, to the security interest in such cash and other collateral that BNY will retain as collateral for the BNY-Holywell Loan in the principal amount of \$1,750,000.

Based on a prompt sale of Miami Center and the release of those funds, it is anticipated that all administrative claims, all priority claims and all claims of unsecured creditors, other than Affiliated Creditors, will be paid substantially in full or in full. Based on the Debtors' analysis of the outstanding claims, an equity may remain for the Debtors.

THE FINANCIAL INFORMATION CONTAINED IN
THIS DISCLOSURE STATEMENT RELATING TO THE

INDEBTEDNESS OF THE DEBTORS TO BNY AND THE SECURITY THEREFOR WAS PREPARED BY BNY FROM ITS RECORDS AND THE INFORMATION TO THE BEST KNOWLEDGE OF BNY IS ACCURATE AND COMPLETE. CERTAIN FINANCIAL AND OTHER INFORMATION WAS OBTAINED FROM THE DEBTORS' PLANS. ACCORDING TO THE DEBTORS' PLANS, SUCH INFORMATION WAS PREPARED BY AGENTS AND EMPLOYEES OF THE DEBTOR AND HAS NOT BEEN AUDITED; HOWEVER, ACCORDING TO THE DEBTORS' PLANS THE INFORMATION IS ACCURATE AND COMPLETE TO THE BEST KNOWLEDGE OF SUCH AGENTS AND EMPLOYEES. CERTAIN OTHER INFORMATION WAS PROVIDED BY GOULD AND CERTAIN OTHER DEBTORS TO BNY FROM TIME TO TIME PRIOR TO THE FILING OF THESE CASES. BNY HAS NO INDEPENDENT KNOWLEDGE OF THE TRUTH, COMPLETENESS OR ACCURACY OF SUCH INFORMATION.

I. DEFINITIONS

In addition to such other terms as are defined in other Articles of this Disclosure Statement, the following terms have the following meanings as used in this Disclosure Statement:

Administration Claim: A cost or expense of administration of these Chapter 11 cases, including any actual, necessary expenses of preserving the estates, and any actual, necessary expenses of operating the Debtors' businesses from and after the Petition Dates, to and including the Confirmation Date, and all allowances approved by the Court in accordance with the Code.

Affiliated Creditors: Any "Affiliate", as "affiliate" is defined in Code §101(2), of any of the Debtors, including, but not limited to, any of the Debtors, any corporations that are wholly or partially owned, either directly or indirectly, by

all or any of the Debtors, and any entities in which any or all of the Debtors own an equity interest, including, but not limited to, Twin Development Corporation, HWL Corporation, Parkwell, Inc., Orion Industries, Inc., Parkwell of Florida, Inc., Holywell Construction Co., Market Street Development Associates, King Street Associates, Charleston Center Corp., Pietro Belluschi & Associates, Inc., NHA Corp., Studley-Holywell Assoc., Inc., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG Institute, Whitehall Security of Florida, Inc., Whitehall Building Services of Florida, Inc., Orion Engineering of Florida, Inc., Holywell Management of Florida, Inc., Racing Club of Florida, Inc., Holywell Hotels of Florida, Inc., Holywell Trading of Florida, Inc., Holywell Real Estate, Holywell Telecommunications of Florida, Inc., Holywell Telecommunications Company, Holywell Insurance Company, Corpus Christi Associates and Great Western Bank Building Associates, but not including MCJV.

Allowed Claim: A Claim, (a) a proof of which is filed within the time fixed by the Bankruptcy Rules (hereinafter defined) or by the Court, or if the Claim arose from the rejection of an executory contract or unexpired lease, within such other time as may be fixed by the Court, or (b) that has been, or hereafter is, scheduled by Debtors as liquidated in the amount and not disputed or contingent; as to which no objection to the allowance thereof has been filed within any applicable period of time fixed by an order of the Court, or as to which any such objection has been determined by a Final Order.

Award: The Award, dated June 1, 1984 entered in the O&Y Arbitration.

Bank, The Bank, BNY: The Bank of New York.

Bankruptcy Code or Code: Title 11 U.S.C. Sections 101 et seq.

Bankruptcy Rules: The Bankruptcy Rules as prescribed by the Supreme Court of the United States, to take effect on August 1, 1983.

BNY Debt: The indebtedness, including interest at the pre-default contract rate to January 31, 1984 and at the post-default contract rate from February 1, 1984, due to BNY from MCLP and Chopin in the approximate amount of \$234,342,743 as of March 14, 1985 plus expenses of approximately \$1,611,563 to March 14, 1985.

BNY Holywell Loan: The \$1,750,000 loan made by BNY to Holywell on October 23, 1983, which loan was guaranteed by Gould, plus interest from October 23, 1983 to August 31, 1984 at the pre-default contract rate and from September 1, 1984 at the post-default contract rate.

Claim: Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any of the Debtors in existence on or as of their respective Petition Dates as described in Section 101(4) of the Code.

Confirmation Date: The date of the entry by the Court of the Order of Confirmation (hereinafter defined).

Court: The United States Bankruptcy Court for Southern District of Florida, including the Bankruptcy Judge presiding in the Debtors' Chapter 11 cases, and any Court having competent jurisdiction to hear appeals therefrom.

Creditor: Any person that holds an Allowed Claim, including governmental units.

Chopin: Chopin Associates, a Florida partnership, one of the Debtors.

Creditors Committees: The Creditors Committee of each of the Debtors appointed by Orders of the Bankruptcy Court.

Debtor or Debtors: Gould, MCC, MCLP, Chopin and Holywell, individually and collectively.

Debtors' Plans: The five plans of reorganization dated February 15, 1985 filed by each of the Debtors.

Disputed Claim: A Claim, other than the BNY Debt and the BNY-Holywell Loan (i) scheduled by the Debtors as disputed, contingent, undetermined, unliquidated or unknown; or (ii) as to which a timely proof of claim and objection has been filed, and which has not been determined by a Final Order.

Effective Date: The date upon which the Order of Confirmation is no longer subject to appeal, on which date no such appeal is then pending, and on which date all of the conditions to the effectiveness of the Plan expressly set forth in the Plan have been satisfied fully or effectively waived.

Final: shall mean, with respect to any order, decree or judgment of any Court, that such order, decree or judgment is no longer subject to appeal or rehearing and as to which no appeal, rehearing or motion for rehearing is then pending.

FF&E: The furniture, fixtures and equipment owned by MCLP or leased to MCLP pursuant to the FF&E leases.

FF&E Leases: The following four FF&E Leases:

1. Lease, dated May 14, 1981, between MCLP, as Lessee and MCJV, as Lessor covering certain furniture, fixtures and equipment used in the Pavillon Hotel (the "Category A Lease").

2. Lease, dated May 14, 1981, between, MCLP, as Lessee and MCJV, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category B Lease").

3. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category C Lease").

4. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category D Lease").

Gould: Theodore B. Gould, an individual, one of the Debtors.

Gould Entities: Any of the entities comprising the defined term "Affiliated Creditors", which are directly or indirectly 100% owned by Gould, including, but not limited to, Twin Development Corporation, Holywell, Whitehall Security, Inc., Whitehall Security of Florida, Inc., Whitehall Building Services of Florida, Inc., Orion Engineering of Florida, Inc., Orion Industries, Inc., Orion Engineering Services, Inc., Charleston Center Corp., 1300 N. 17th Street Associates, Eleven Dupont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG Institute, Racing Club of Florida, Inc., Parkwell Inc., Parkwell of Florida, Inc., Holywell Construction Company, Holywell Management Company of Florida, Inc., HWL Corporation, Peitro Belluschi & Associates, Inc., Holywell Hotels, Inc., Holywell Telecommunications Company, Holywell Trading of Florida, Inc., Holywell Real Estate, Holywell Telecommunications of Florida, Inc., Holywell Insurance Company, Corpus Christi Associates, Great Western Bank Building, NHA Corp. and Studley-Holywell Assoc., Inc., but excluding MCJV.

Gould FF&E Leases: shall mean collectively the Category C and Category D Leases.

Holywell: Holywell Corporation, a Delaware corporation, one of the Debtors.

Market Value: \$255,600,000, the appraised market value of Miami Center as of November 15, 1984 as indicated in an appraisal report by Charles V. Failla & Associates, Inc., which report was certified by Charles V. Failla, M.A.I.

MCLP: Mami Center Limited Partnership, a Florida limited partnership, one of the Debtors.

MCC: Miami Center Corporation, a Florida corporation, one of the Debtors.

MCJV Claim: shall mean the claim of MCJV filed by O&Y Florida on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity for unpaid rent due under the MCJV FF&E Leases.

MCJV FF&E Leases: shall mean collectively the Category A and Category B Leases.

MCJV Property: Those unimproved parcels of land adjacent to, or near, Miami Center that are owned by MCJV.

MCJV: Miami Center Joint Venture, a Florida partnership, the partners of which are Gould and O&Y Florida.

Miami Center: shall have the meaning set forth in Article II.

Miami Center Closing Date: 45 days from the Effective Date.

Order of Confirmation: The Order entered by the Court confirming the Plan in accordance with the provisions of Chapter 11 of the Code.

O&Y: shall mean O&Y Equity and O&Y Florida, collectively.

O&Y Equity: Olympia & York Equity Corp., a New York corporation.

O&Y Florida: Olympia & York Florida Equity Corp., a Florida corporation.

O&Y Arbitration: The arbitration proceeding known as *The Matter of Arbitration between Theodore B. Gould, Claimant and Olympia & York Florida Equity Corp. and O&Y Equity Corp., Respondents* (case no. 13-115-0547-82)

which proceeding resulted in an Award, dated June 1, 1984. On or about September 20, 1984 O&Y filed a motion requesting the Court to lift the automatic stay, to remove Gould as managing joint venture partner and to require Gould to deliver documents to effectuate his removal. On October 24, 1984 the Court entered an order denying that part of O&Y's Motion requesting the removal of Gould and the delivery of documents for his removal, but granting a lifting of the automatic stay for the limited purpose of permitting O&Y or Gould to contest the Award. O&Y subsequently brought an action in the United States District Court for the Southern District of New York (Case no. 82-CIV-5918 (WK)), seeking to modify or vacate the Award. A hearing was held on February 1, 1985 before Judge Knapp of the Southern District, who reserved decision on the motion.

O&Y Claim: The claim filed by O&Y Florida against certain of the Debtors on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity.

Pavillon Hotel: The hotel located in Miami Center.

Parkwell: Collectively, Parkwell Inc., and Parkwell of Florida, Inc., both wholly owned subsidiaries of Holywell.

Petition Dates: August 22, 1984, the dates on which the Debtors filed their respective Chapter 11 petitions with the Court.

Plan: This Chapter 11 Plan, in its present form, or as it may be amended or modified in accordance with the Code.

Pro-rata: With respect to any distribution on account of any Allowed Claim, in the same proportion as the amount of such Allowed Claim bears to the aggregate amount of all Allowed Claims of its class.

Secured Claim: An Allowed Claim secured by a lien, security interest, judgment or other charge against an interest in property in which any Debtor or the Debtors have

an interest, or which is subject to setoff under Section 553 of the Code, not voidable under any section of the Code to the extent of the value (determined in accordance with Section 506(a) of the Code) of the interest of the holder of such Allowed Claim in the Debtors' interest in such property or to the extent of the amount subject to such setoff, as the case may be.

Washington Partnerships: 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Twin Development Corporation, Eleven DuPont Circle Associates, and DuPont Land Associates.

Washington Proceeds: The sum of approximately \$32,422,798.87, which was received by Gould and certain Gould Entities from the sale of the Washington Properties and which is being held, subject to Court order, in accounts established at Florida National Bank.

Washington Properties: The real and personal property conveyed by the Washington Partnerships pursuant to the Agreement dated July 26, 1984, as amended, by and between the Hadid Investment Group, Inc. and the Washington Partnerships.

II. INTRODUCTION

On August 22, 1984 Gould, Holywell, Chopin, MCLP and MCC filed petitions under Chapter 11 of the Bankruptcy Code. Gould and MCC are the general partners of Chopin and MCLP. The cases have been consolidated for administration purposes. Gould is the sole shareholder of Holywell, and Gould and Holywell, own directly or indirectly, all or substantially all of the stock of the corporations which are Gould Entities and a controlling interest in the Washington Partnerships.

A. *Miami Center.*

Chopin is the owner of certain real estate located in Miami, Dade County, Florida. Chopin leased the real estate

to MCLP under a long-term ground lease. MCLP constructed on the real estate an office/hotel complex (the "Improvements") which is substantially completed. The real estate, as so improved, and Chopin's and MCLP's leasehold interests under the ground lease in the real estate and the Improvements are collectively hereinafter referred to as "Miami Center". The office building is known as the Edward Ball Building and the hotel is known as the Pavillon Hotel. Chopin and MCLP borrowed from BNY to finance the acquisition of the land and the construction of the Improvements on Miami Center.

The indebtedness due to BNY from MCLP and Chopin, including interest to February 1, 1984 at the pre-default contract rate and thereafter at the post-default contract rate, amounts to approximately \$234,342,743 as of March 14, 1985 plus expenses of approximately \$1,611,563 to March 14, 1985. Based on BNY's prime rate as of March 14, 1985, the monthly interest accrual is \$2,259,600 and expenses have been accruing at approximately \$104,000 per month.

The BNY Debt is guaranteed by Gould, Holywell and MCC. The direct note obligations and the guarantees are secured by mortgages on Miami Center, a pledge of 100% of the stock of Holywell, Twin, MCC, HWL Corporation, Parkwell, Holywell Construction and Pietro Belluschi, a pledge of 66⅔% of the stock of NHA Corp. and a pledge of 50% of the stock of Studley-Holywell Corp., by a security interest in and an assignment of the Washington Proceeds, by an assignment of any and all property, real or otherwise, resulting from or arising out of any judgment or award made in the O & Y Arbitration, by an assignment of all funds or distributions to Gould resulting from any rental, lease, assignment, sale, transfer or refinancing of all or part of the MCJV Property, and by a security interest in all furniture, fixtures and personal property owned or to be owned by Gould (or in which Gould has an interest) including the FF&E leased by Gould and Holywell Telecommunications Company to MCLP.

In addition, Holywell and Gould are indebted to BNY in the principal amount of \$1,750,000 in connection with a loan made by BNY to Holywell in October of 1983 to enable Gould to settle a lawsuit entitled *Clark Enterprises, Inc. v. Holywell Corporation and Theodore B. Gould* and to acquire 20% of the stock of Holywell. As of February 15, 1985 the total amount of the BNY Holywell Loan, including interest to August 31, 1984 at the pre-default contract rate and from September 1, 1984 at the post-default contract rate is approximately \$2,235,126.76. The BNY Holywell Loan is guaranteed by Gould and is secured by all of the collateral set forth above, except for the mortgages on Miami Center.

B. Furniture Fixtures & Equipment.

MCLP is presently leasing certain of the FF&E used with Pavillon Hotel pursuant to the Gould FF&E Leases and the MCJV FF&E Leases. The Gould FF&E Leases cover equipment having a cost price of approximately \$7,700,000. Under the terms of BNY's Plan, which contemplates a substantive consolidation of the estates of all of the Debtors, the leasehold interests of MCLP and Gould under the Gould FF&E Leases would merge (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are lessors under the Gould FF&E Leases to convey directly to MCLP the FF&E covered by such leases) and MCLP would become owner of the FF&E covered by the Gould FF&E Lease, free and clear of such leases.

One of the MCJV FF&E Leases, the Category A Lease, covers FF&E having a cost of approximately \$4,775,000, and the other, the Category B Lease, covers FF&E having a cost of approximately \$3,000,000. MCLP, as lessee, under both leases, has a right to purchase the FF&E covered by the MCJV FF&E Leases at a price fixed in such leases. BNY's Plan contemplates that the purchase option will be exercised and that MCLP will become the owner of the FF&E covered by such Leases.

The treatment of the Gould FF&E Leases contemplated by BNY's Plan is consistent with the provisions of the leases that fully and unconditionally subordinate both the Lessor's and Lessee's interest to BNY's mortgages. By virtue of the subordination provisions, under any disposition of Miami Center that recognizes the superiority of the BNY's liens, such as that contemplated by both BNY's and the Debtors' Plans, the purchaser would be entitled to receive title to the FF&E covered by such leases free of the lease obligations.

Similarly, under both of the MCJV FF&E Leases, the Lessee's interest is subordinate to BNY's lien, and under the Category A Lease the Lessor's interest is also subordinate to BNY's mortgages. Under the Category B Lease, although the Lessor's interest is not subordinate to BNY's mortgages, any purchaser of Miami Center has, in effect, the right to pick-up the lease after the purchase. Although, at least in the case of the Category B Lease, the Lessor's interest cannot be foreclosed, the Lessor's rights under both MCJV FF&E Leases in connection with a disposition of Miami Center are limited to receipt of the rent due under the leases from the date of purchase, or if the purchase option is exercised, the receipt of the option price.

C. Valuation of Miami Center.

BNY retained Charles Failla an MAI appraiser to appraise Miami Center. Mr. Failla concluded that the Market Value of Miami Center as of November 15, 1984 to be \$255,600,000 "as is". He appraised the value of the FF&E, including the FF&E covered by the Gould and MCJV FF&E Leases at \$13,000,000 and assumed that the FF&E is owned by MCLP.

D. Washington Properties.

Gould individually, and through his 100% ownership of Holywell, owned or controlled the Washington Partnerships. In December of 1984 the Washington Partnerships conveyed the Washington Properties, and there became payable to

Gould and certain of the Gould Entities approximately \$32,422,798 (the "Washington Proceeds").

The Bankruptcy Court has determined that the Washington Proceeds are BNY's cash collateral. Pursuant to Court order, the Washington Proceeds are now held and invested in segregated accounts, subject to BNY's security interests and subject also to further order of the Bankruptcy Court. Holywell, through various subsidiaries, had been performing management, leasing, security, engineering and cleaning services for the Washington Properties and those contracts have terminated as a result of the sale. Accordingly, the only operating asset the Debtors now own is Miami Center, except for Parkwell which operates parking facilities on the Miami Center and the MCJV Property.

E. Miami Center Joint Venture.

Gould, individually, is a 50% joint venture partner with O&Y Florida in MCJV, which owns unimproved parcels of land adjacent to, or near, Miami Center (the "MCJV Property"). The Debtor maintains that the MCJV Property has a value of \$104,000,000. The MCJV Property is subject to a mortgage originally held by Bank of Montreal in the principal amount of \$16,000,000, and which, according to the Debtors' Plans, has been acquired by O&Y Florida.

Pursuant to the Award, dated June 1, 1984, entered in the O&Y Arbitration, Gould received the right to acquire the joint venture interest of O&Y Florida by paying to O&Y Florida the sum of \$10,000 plus the sum of \$30,000,000, and by satisfying the Bank of Montreal mortgage. A dispute has arisen between Gould and O&Y Florida as to the respective rights of the parties under the Award and the joint venture agreement. The dispute is the subject of litigation currently pending in the United States District Court for the Southern District of New York (Case No. 82-Civ.-5918 (WK)).

O&Y Florida, on behalf of O&Y Florida for the benefit of MCJV and O&Y Florida, filed a claim in the Gould

proceeding in the amount of \$34,150,000 "plus interest, plus additional substantial contingent, unliquidated amounts, including Gould's obligations as general partner and guarantor, arising out of debts due from MCJV to O&Y Florida and O&Y Equity, in an amount exceeding \$40,000,000 which has not yet been fully determined***"

Paragraph 8 and 9 of the Proof of Claim further provide as follows:

"8. No security interest is held by O&Y or MCJV against Gould, except his interest in MCJV's property, inclusive of the ownership of the FF&E leased property rights, claims and interests, as above described."

"9. This claim is a general unsecured claim, except to the extent of MCJV's right and obligation to divide and apportion the MCJV's property after all adjustments for debts and liabilities owed by Gould and related entities and corporations to it."

III. PLAN OF REORGANIZATION

A. *Summary of Plan.*

1. *Substantive Consolidation.* A review of the schedules and plans filed by the Debtors, the litigation analysis set forth in the Debtors' Plan, and a Rule 2004 Examination of Gould, reveals that there are numerous claims between and among the Debtors, and between and among the Debtors and their affiliates. These claims arise from a variety of transactions including the ground lease between Chopin and MCLP, the Gould FF&E Leases, the cross guarantees and co-maker obligations of the Debtors for the indebtedness of Chopin and MCLP to the Bank, and a variety of other transactions. The resolution of the validity and the amounts of the claims between and among the Debtors would be an extremely difficult and time consuming task and the attendant legal and accounting fees would give

rise to sizable administrative claims against each of the Debtors' estates.

In addition, one or more of the Debtors are jointly and severally liable on judgments that were obtained prior to the filing of the petitions, and may be jointly and severally liable for claims asserted in litigation that is still pending. The obligations of the Debtors to third parties also give rise to claims for reimbursement, contribution and subrogation between and among the Debtors. As in the case of the inter-Debtor transactions, the task of sorting out these claims for reimbursement, contribution and subrogation would be difficult and time consuming and would also give rise to large administrative claims.

The identity of ownership and control of the corporate and partnership Debtors, the use of certain of the Debtors as service or holding corporations that have no independent purpose, but derive all of their income from the other Debtors or Debtor controlled entities, and the frequent disregard of the Debtors' legal entities coupled with substantial transfers of assets between and among the Debtors, all justify substantive consolidation.*

The substantive consolidation of the Debtors contemplated by BNY's plan eliminates the claims between and among the Debtors and creates a common fund of assets available to pay all unrelated creditors, other than Affiliated Creditors. The substantive consolidation does not prejudice any one class of Creditors, and if it did, the prejudice would be minimal in comparison to the benefits to be derived by all of the Creditors from the substantive consolidation of the Debtors' estates. In any event, BNY's Plan reserves to any

*Based upon the facts set forth herein there is ample authority to support the substantive consolidation contemplated by BNY's Plan. See, e.g., 5 *Collier on Bankruptcy* (15th ed. 1984) 1100.06, *Pension Ben. Guaranty Corp. v. Ouimet Corp.*, 711 F. 2d 1085 (1st Cir. 1983), *Chemical Bank New York Trust Company v. Keel*, 369 F. 2d 845 (2nd Cir. 1966).

party-in-interest the right to seek relief from the substantive consolidation of the Plan, if such party-in-interest's rights are materially and adversely affected by substantive consolidation.

2. *Classification of Claims*—Under BNY's Plan the claims and interests of all Debtors are classified as follows:

Class 1—Administration Claims.

Class 2—The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs, and expenses, as provided in the documents evidencing such Claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 3—The Secured Claim of BNY under the BNY Holywell Loan, including interest at the pre-default contract rate to August 31, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such Claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 4—All Secured Claims other than the BNY Debt and the BNY Holywell Loan, including interest at the rate of 10% per annum, and attorneys' fees, as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 5—All Claims which are entitled to priority under Code §507 as the same are allowed, approved and ordered paid by the Court, including claims for wages, salaries and commissions entitled to priority

under §507(a)(3) and (4), and tax claims of governmental units entitled to priority under §506 and §507(a)(6), and including interest on such Claims as authorized under applicable law and allowed and ordered paid by the Court.

Class 6—All claims of general unsecured creditors, excluding claims of Affiliated Creditors and excluding the MCJV Claim and the O&Y Claim.

Class 7—The MCJV Claim and the O&Y Claim.

Class 8—The Claims of Affiliated Creditors.

Class 9—The interest of the Debtors which remain after consummation of this Plan.

3. *Treatment of Claims*—Under BNY's Plan, Allowed Claims will be treated as follows:

1. Class 1 Claims are not impaired. Class 1 Claims will be paid in full.

2. The Class 2 Claim is impaired. The portion of BNY's Class 2 Claim consisting of the principal of the BNY Debt and interest thereon at the pre-default contract rate to the Miami Center Closing Date shall be paid and satisfied upon the sale of Miami Center to BNY. The Class 2 Claim is impaired since BNY will receive less than the full amount of BNY's Class 2 Claim. In particular, for the purpose of obtaining a prompt implementation of its Plan, but only under its Plan, and in consideration of the releases and a dismissal of the litigation, BNY is willing to accept interest on its indebtedness at the pre-default contract rate of interest rather than the post-default contract rate of interest as authorized by the relevant loan documents and applicable law. The difference

between the pre-default contract rate of interest and the post-default rate of interest, on a monthly basis, is approximately \$334,455. Assuming that the sale of Miami Center is concluded, as provided in BNY's Plan, on June 1, 1985, the net savings to the estate which will be available for all creditors resulting from BNY's willingness to accept the pre-default contract rate, would be approximately \$5,397,660.11.

3. The Class 3 Claim is impaired. The portion of BNY's Class 3 Claim consisting of the principal of the BNY Holywell Loan and interest thereon at the pre-default contract rate to the date of payment shall be paid in full. The Class 3 Claim is impaired since BNY will receive less than the full amount of BNY's Class 3 Claim. In particular, for the purpose of obtaining a prompt implementation of its Plan, but only under its Plan, and in consideration of the releases and a dismissal of the litigation, BNY is willing to accept interest on its indebtedness at the pre-default contract rate of interest, rather than at the post-default contract rate of interest, as authorized by the relevant loan documents and applicable law.

4. Class 4 Claims are impaired. The principal of Class 4 Secured Claims shall be paid in full, with interest to the date of payment at the rate of 10% per annum. Class 4 Claims are impaired to the extent that interest at the rate of 10% per annum is less than the rate of interest that such creditors would be entitled to receive under applicable law or contract.

5. Class 5 Claims are not impaired. Class 5 Claims are claims entitled to priority. Class 5 Claims will be paid in full with interest.

6. Class 6 Claims may be impaired if there are not sufficient funds to pay this Class in full with interest. Class 6 Claims, after payment of Allowed Class 1, 2, 3, 4 and 5 Claims shall be paid in full or in part Pro Rata.

7. Class 7 Claims may be impaired. The amount of the Class 7 Claim will be determined after the resolution of the O&Y Arbitration and will be paid from the MCJV Property. If there is any deficiency the claim will be paid to the extent that funds are available after payment of all Allowed Class 1, 2, 3, 4, 5 and 6 Claims.

8. Class 8 Claims are impaired. Class 8 Claims will be paid in full or in part Pro Rata after payment of all Allowed Class 1, 2, 3, 4, 5, 6, and 7 Claims.

9. Class 9 Claims are impaired. Class 9, after the payment of all Allowed Class 1, 2, 3, 4, 5, 6, 7, and 8 claims, shall receive the residue of the estates Pro Rata.

4. Summary of Indebtedness.

Based upon BNY's records, and upon the schedules and the plans filed by the Debtors, a review of public records, and information supplied from time to time to BNY by Gould it appears that the total indebtedness of the Debtors is as follows:

(a) BNY Debt of approximately \$234,342,742.93 as of March 14, 1985, which includes interest to February 1, 1984 at the pre-default contract rate and from February 1, 1984 at the post-default contract rate, plus interest thereafter at the post-default contract rate, plus expenses of approximately \$1,611,563 to March 14, 1985 and expenses accruing thereafter, which indebtedness is secured as set forth above.

(b) BNY-Holywell Loan in the principal amount of \$1,750,000 plus interest from October 23, 1983.

(c) Real Estate Taxes on Miami Center for 1983 and 1984 of approximately \$8,200,000, and 1985 real estate taxes accruing at approximately \$456,000 per month.

(d) Personal Property Taxes on personal property owned or used by MCLP for 1984 of approximately \$300,000, plus 1985 personal property taxes accruing at approximately \$25,000 per month.

(e) Mechanics liens, judgments and other secured indebtedness of MCLP as of August 22, 1984 of approximately \$7,711,552.

(f) Unsecured indebtedness of the Debtors as of August 22, 1984 which is entitled to priority under Code §507 of approximately \$3,100,000.

(g) Unsecured indebtedness of the Debtors as of March 14, 1985 of approximately \$16,600,000 which includes the proof of claim for rejection filed by Trusthouse Forte.

(h) Indebtedness claimed on the MCJV Claim and O&Y Claims.

(i) Unsecured indebtedness of the Debtors to Affiliated Creditors of approximately \$26,000,000.

In addition, the Debtors are parties to various actions. A summary of these actions, taken verbatim from the Debtors' Plans, is annexed as Exhibit C to the Plan. BNY makes no representations or warranties as to the completeness or accuracy of the summary nor does it opine on the legal conclusions set forth in the summary.

5. Implementation of a Plan.

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of \$255,600,000 pursuant to a contract of sale substantially in the form attached as Exhibit A to the Plan. Within five business days after the Effective Date, the trustee and BNY or its designee would execute a contract of sale which requires

a closing of title within 45 day after the Effective Date. The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt calculated at the pre-default interest rate outstanding on the Miami Center Closing Date plus expenses which, assuming a closing date of June 1, 1985 and no change in BNY's prime rate would be a total of \$236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately \$19,012,382) to the trustee. The trustee shall be required to:

(i) pay, (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984 and pay the debtors pro-rata portion of the real estate taxes for 1985 due to the Miami Center closing date.

(ii) pay, (if requested by BNY, under protest) from such cash the personal property taxes for 1983 and 1984 and pay the debtors pro-rata portion of the personal property taxes for 1985 due to the Miami Center closing date.

(iii) take all steps and make all payments from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases and to obtain title to the FF&E covered by the MCJV leases.

Upon the passing of title of Miami Center to BNY, BNY's liens and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY Holywell Loan and the balance of the Washington Proceeds will be available for distribution to the creditors.

6. Litigation Between the Debtors and the Bank.

On or about January 28, 1985 MCLP and Chopin instituted, in the United States District Court for the Southern District of Florida, an action against the Bank and

its participants (the "Debtors' District Court Action"). The complaint contained three counts, the first count seeking a mandatory injunction requiring the Bank to deliver non-disturbance agreements, the second count seeking to set aside as preferential the June 11, 1984 agreement between the Bank and the Debtors which agreement included a release by the Debtors of all claims against the Bank and its participants and the third count seeking a money judgment against the Bank and its participants as a result of alleged damages sustained by reason of the Bank's refusal to give non-disturbance agreements. On or about February 11, 1985 the Bank instituted in the Bankruptcy Court an adversary proceeding to determine the amount, validity and extent of its liens on Miami Center (the "Bank Adversary Proceeding"). That matter was set for trial on March 14, 1985. On or about February 20, 1985 the Debtors amended the complaint in the Debtors' District Court Action to include four additional counts (the "Amended Complaint"). Three of the counts allegedly arose out of the "prime rate" definition contained in the Bank notes, one count being for alleged violation of the Racketeer Influenced Corruption Act (RICO), one count being for fraud and the third count being for breach of contract. The fourth count alleged criminal usury. On or about March 7, 1985 the Debtors filed their answer to the Bank Adversary Proceeding which, in substance, asserted as affirmative defenses the claims contained in the Amended Complaint. On or about March 5, 1985 the Debtors moved in the Bankruptcy Court to stay the Bank Adversary Proceeding on the basis of dependency of the District Court action. Judge Britton reserved decision at the hearing of that motion on March 11, 1985 indicating that he had not had an opportunity to review the papers that were submitted and further indicating that he would make a decision on March 14, the trial date. On March 12 the Debtors made an emergency motion in the United States District Court for the Southern District of Florida returnable March 13 seeking an order of that court withdrawing the reference to the

Bankruptcy Court as to the RICO count and staying the Bank Adversary Proceeding. The United States District Court (Judge Hoeveler) denied the motion.

At the hearing on March 14 before Judge Britton the issue as to the scope of the two releases given by the Debtors to the Bank was argued and the trial of the Bank Adversary Proceeding was adjourned pending a determination by Judge Britton of the motion to stay the Adversary Proceeding. On March 20, 1985 Judge Britton entered a Memorandum Decision and Judgment determining that each of the five defenses asserted by the Debtors in the Bank Adversary Proceeding is barred by the releases and denied the request for a stay of the Bank Adversary Proceeding. The Judgment determined the amount, validity and extent of the liens of the Bank in the total amount of \$234,342,742.93 to March 14, 1985, plus per diem default interest from March 14, 1985 at the rate of \$75,320.16 per day. The Debtors have the right to appeal the judgment which appeal must be taken within ten days from March 20, 1985.

IV. COMPARISON OF BNY'S PLAN AND THE DEBTORS' PLANS, FEASIBILITY OF BNY'S PLAN, AND LIQUIDATION ANALYSIS

1. COMPARISON OF PLANS AND FEASIBILITY

BNY's Plan is based upon a firm Contract of Sale with a financially responsible buyer, it establishes a fixed timetable for closing and assures the maximum availability of liquid assets (cash) for the payment of all Creditors, except perhaps Affiliated Creditors. As the following comparative analysis makes clear, the Purchase Agreement that is the cornerstone of the Debtors' Plans is nothing more than a nonbinding, unenforceable, and risk free option in favor of an unidentified buyer whose financial ability is neither stated nor assured, and acceptance of the Debtors' Plans would result in a substantially lesser amount of cash being available for all Creditors.

A. Identity of Purchaser:

Debtors' Plans: The proposed purchaser under the Debtors' Plans is not identified. The party to the Purchase Agreement, is Hadid Investment, as Trustee. The principal is not disclosed, nor is the source or the availability of the funds required to close stated or assured.

BNY's Plan: BNY is the purchaser under its Plan. With assets of in excess of 11 billion dollars, there can be no doubt of BNY's ability to fund the cash portion of the purchase price due under the Contract of Sale.

B. Purchase Price: Under both BNY's Plan and the Debtors' Plans, all or a portion of the Washington Proceeds are to be made available for payment of Creditors. As the following comparative chart shows, however, although the gross purchase price stated in the Debtors' Purchase Agreement appears to be \$4.4 million greater than BNY's purchase price, the *net* purchase price is actually less. And, under the Debtors' Plans, a portion of the Washington Proceeds would be needed to close; under BNY's Plan none would be required.

Debtors' Plan:

	Closing 8/15/85	Closing 9/15/85
Purchase Price:	\$260,000,000	\$260,000,000
Less:		
BNY Debt of 234,342,742.93 to March 14, 1985 plus approximate expenses and interest, at the post-default contract rate, from March 14, 1985;	\$248,021,586	\$250,385,186
Real Estate Taxes (approximate):	\$ 12,100,000	\$ 12,550,000
Personal Property Taxes (approximate):	\$ 475,000	\$ 500,000
Mechanics and Judgment liens (approximate):	\$ 5,000,000	\$ 5,000,000
Escrow or Reserve for Cost to complete and tenant finish work (BNY's estimate —\$8,000,000 based on advice from Turner Construction Co.):	\$ 8,000,000	\$ 8,000,000
MCJV FF&E Option Price* (approximate):	\$ 2,000,000	\$ 2,000,000
Deficit (to be made up from Washington Proceeds):	\$ (15,596,586)	\$ (18,435,186)

BNY's Plan:

	Closing 6/1/85
Purchase Price:	\$255,600,000
Less:	
BNY Debt (of \$229,814,665 to March 14, 1985 plus approximate expenses and interest, at the pre-default contract rate):	\$236,587,618
Real Estate Taxes (approximate):	\$ 11,000,000
Personal Property Taxes (approximate):	\$ 425,000
Mechanics and Judgment liens (approximate):	\$ 5,000,000
MCJV FF&E Option Price (approximate):	\$ 2,000,000
Escrow or Reserve for Tenant Finish Work:	None
Deficit (to be made up from Washington Proceeds):	None

*Gould is a 50% partner in MCJV, and MCJV is scheduled by the Debtors as a Creditor for approximately \$3,100,000. As indicated O&Y Florida has filed claims in connection with the MCJV FF&E Leases and the Miami Center Joint Venture Agreement. In view of the inter-relationships, it is impossible to ascertain at this time how much would be payable to exercise the options. It is estimated that the sum would not exceed \$2,000,000.

C. Contingencies:

Debtors' Plan: The Purchase Agreement is not even a contingent contract at this time. Under the Purchase Agreement, Hadid or its unidentified principal, has until May 12, 1984 to "study" the property, after which it can decide whether or not to be bound under the Purchase Agreement. At the end of the study period, Hadid can walk away from the Purchase Agreement, without any liability or monetary risk. The Purchase Agreement provides that the Study Period may be extended to September 12, 1985 if an "acceptable" title report is not delivered by May 12, 1985. The Purchase Agreement is simply *not* binding, and whether or not it will ever be, is wholly within the discretion of the unidentified purchaser.

In addition, the Debtors' Plans are not feasible unless the Debtors prevail in their applications for equitable subordination of the BNY Debt (see, for example, pages 13-14 of the Holywell Amended Disclosure Statement and page 8 of the Holywell Amended Plan of Reorganization). BNY must oppose any effort to subordinate BNY's claims, and that process will require a substantial time to litigate (delaying confirmation of the Debtors' Plans, consummation, and payment to any creditors). Given the Court's ruling of March 20, 1985 upholding the releases of Debtors' claims against BNY, it is unlikely that the Debtors' claims of "inequitable conduct" can prevail. If the "inequitable conduct" claims do not prevail, the Debtors' Plans as amended cannot be implemented.

BNY's Plan: The *only* condition precedent to the closing under BNY's Plan is the delivery of the discontinuances of certain litigation filed by the Debtors against BNY and the releases contemplated by the Contract of Sale. As indicated the Bankruptcy Court has entered a Memorandum Decision and Judgment in favor of the Bank. In view of this, this condition is not and should not be a substantial obstacle to confirmation or consummation of BNY's Plan.

D. *Timing for Closing and Enforceability:*

Debtors' Plans. Even assuming Hadid or its unnamed principal decides to be bound, there would be no closing until August 15, 1985, and possibly September 15, 1985.

BNY's Plan: BNY's Contract of Sale contemplates a closing on June 1, 1985—before Hadid or its principal may be required to decide whether or not the Purchase Agreement is binding.

E. *Purchaser's Risk Money*

Debtors' Plan: Under the Debtors' Plans, the Purchaser has *no* money at risk until it decides whether or not to be bound on May 12, 1985. Even if it elects to be bound, only \$5 million is at risk, which is less than 2 months carrying costs for Miami Center. The typical downpayment for transactions of this kind—which assures that a purchaser is *bona fide*—is 10% of the purchase price.

BNY's Plan: BNY already has well in excess of \$234,000,000 at risk in Miami Center. There can be no doubt regarding the amount at risk for BNY, or its unequivocal intention to close in accordance with the Contract of Sale.

2. LIQUIDATION ANALYSIS:

The comparison of BNY's Plan and the Debtors' Plans reveals the effect that an unsuccessful reorganization followed by Chapter 7 liquidation would have on the dividend to the holders of all claims—administrative, priority, and general unsecured. The taxes, interest and expenses secured by the primary liens on the major assets—Miami Center and the Washington Proceeds—accrue at the rate of approximately \$2,850,000 per month. A prompt closing in accordance with BNY's Plan assures the maximum distribution to all creditors from the Washington Proceeds while preserving an equity for the Debtors. By contrast, the Debtors' Plans or a liquidation under Chapter 7, assures only an erosion, if not a total depletion, of the Washington

Proceeds, which is the only cash that is available to creditors, and would substantially reduce, or even eliminate, the dividend to all other creditors.

V. MIAMI CENTER LIQUIDATING TRUST

Under BNY's Plan, a Trustee will be appointed on the Effective Date to implement the Plan on behalf of the Debtors. The Trustee's principal duties will be to administer the affairs of Miami Center, the only operating asset of the Debtors, pending the sale to BNY, to take whatever actions are required to perform the Contract of Sale with BNY, to hold title to the remainder of the assets of the Debtors, including the Washington Proceeds, and to supervise the distributions to creditors. Although the duties of the Trustee will be essentially ministerial, the trust provisions of the Plan vest the Trustee with broad and sufficient powers to assure the prompt and timely implementation of the Plan. The Trustee will be appointed by the Court, and if the Court requests, any party-in-interest may provide the Court with names of qualified nominees.

VI. CONTROL OF THE DEBTORS

By virtue of the creation of the Miami Center Liquidating Trust, the Trustee will be in control of all of the Debtors' assets from the Effective Date until the claims of all creditors are paid or resolved. Thereafter, the remaining assets, if any, would revert to the Debtors, and their principal Theodore B. Gould.

VII. CONFIRMATION PROCEDURE

A. Confirmation Hearing. A hearing on confirmation of BNY's Plan has been scheduled by the Bankruptcy Court for 10:00 o' clock A.M. on April 29, 1985 in Bankruptcy Court in Miami, Florida.

At the confirmation hearing, the Bankruptcy Court will determine whether to confirm the Plan. In order to confirm the Plan, the Bankruptcy Court must find that BNY has

complied with the good faith and disclosure requirements of the Bankruptcy Code, that the distribution under the Plan to any dissenting creditor or partner is no less than the distribution he would receive if the Debtors were liquidated under Chapter 7 of the Bankruptcy Code, that confirmation of the Plan is not likely to be followed by liquidation or the need for further financial reorganization of the Debtors, and that at least one class of impaired claims has accepted the Plan.

B. Confirmation by the Acceptance Method. The Bankruptcy Court may confirm the Plan if it finds that the requirements for confirmation have been met and that all impaired classes have accepted the Plan.

A class of claims accepts the Plan if a majority of its voting members vote to accept the plan and that majority which has voted to accept the Plan holds at least two-thirds of the total dollar amount of claims held by all class members voting on the Plan.

C. Confirmation by the Non-Acceptance Method. The Bankruptcy Code also provides that the Plan may be confirmed even if it is rejected by one or more impaired classes, provided at least one impaired class has accepted the Plan.

The Plan is deemed fair and equitable if it provides that each holder of a secured claim in the class retains his lien and receives deferred cash payments totalling at least the allowed amount of his claim, of a value, as of the effective date of the Plan, of at least the value of his secured interest in the property subject to his lien.

Dated: February 26, 1985, as amended as of March 22, 1985.

THE BANK OF NEW YORK

By: [illegible]

Vice President

EMMET, MARVIN & MARTIN

By: [illegible]

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ATTORNEYS FOR THE BANK OF NEW YORK

APPENDIX H
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11 Proceedings

CASE NOS.

84-01590-BKC-TCB

84-01591-BKC-TCB

84-01592-BKC-TCB

84-01593-BKC-TCB

84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, et al.,

Debtors.

**AMENDED CONSOLIDATED PLAN OF
REORGANIZATION PROPOSED BY
THE BANK OF NEW YORK**

**CONSOLIDATED
PLAN OF REORGANIZATION**

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- VII. Disputed Claims
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- IX. Condition Precedent to the
Effectiveness of the Plan
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- XIV. Retention of Jurisdiction

The Bank of New York submits the following Plan of Reorganization:

I. DEFINITIONS

In addition to such other terms as are defined in other Articles of this Plan, the following terms have the following meanings as used in this Plan:

Administration Claim: A cost or expense of administration of these Chapter 11 cases, including any actual, necessary expenses of preserving the estates, and any actual, necessary expenses of operating the Debtors' businesses from and after the Petition Dates, to and including the Confirmation Date, and all allowances approved by the Court in accordance with the Code.

Affiliated Creditors: Any "affiliate" of any of the Debtors as "affiliate" is defined in Code §101(2), including but not limited to, any of the Debtors, any corporations that are wholly or partially owned, either directly or indirectly, by all or any of the Debtors, and any entities in which any or all of the Debtors own an equity interest, including, but not limited to, Twin Development Corporation, HWL Corporation, Parkwell, Inc., Orion Industries, Inc., Parkwell of Florida, Inc., Holywell Construction Co., Charleston Center Corp., Pietro Belluschi & Associates, Inc., NHA corp., Studley-Holywell Assoc., Inc., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG Institute, Whitehall Security of Florida, Inc., Whitehall Building Services of Florida, Inc., Orion Engineering of Florida, Inc., Holywell Management of Florida, Inc., Racing Club of Florida, Inc., Holywell Hotels of Florida, Inc., Holywell Trading of Florida, Inc., Holywell Real Estate, Holywell Telecommunications of Florida, Inc., Holywell Insurance Company, Corpus Christi Associates and Great Western Bank Building Associates, but not including MCJV.

Allowed Claim: A Claim, (a) a proof of which is filed within the time fixed by the Bankruptcy Rules (hereinafter defined) or by the Court, or if the Claim arose from the rejection of an executory contract or unexpired lease, within such other time as may be fixed by the Court, or (b) that has been, or hereafter is, scheduled by Debtors as liquidated in the amount and not disputed or contingent; as to which no objection to the allowance thereof has been filed within any applicable period of time fixed by an order of the Court, or as to which any such objection has been determined by a Final Order.

Bank, The Bank, BNY: The Bank of New York.

Bankruptcy Code or Code: Title 11 U.S.C. Sections 101 et seq.

Bankruptcy Rules: The Bankruptcy Rules as prescribed by the Supreme Court of the United States, to take effect on August 1, 1983.

BNY Debt: The indebtedness, including interest at the pre-default contract rate to January 31, 1984 and at the post-default contract rate from February 1, 1984, due to BNY from MCLP and Chopin in the amount of approximately \$234,342,743 as of March 14, 1985 plus expenses of approximately \$1,611,563 to March 14, 1985.

BNY Holywell Loan: The \$1,750,000 loan made by BNY to Holywell on October 23, 1983, which loan was guaranteed by Gould, plus interest to October 23, 1983 to August 31, 1984 at the pre-default contract rate and from September 1, 1984 at the post-default contract rate.

Claim: Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any of the Debtors in existence on or as of their respective Petition Dates as described in Section 101(4) of the Code.

Confirmation Date: The date of the entry by the Court of the Order of Confirmation (hereinafter defined).

Court: The United States Bankruptcy Court for the Southern District of Florida, including the Bankruptcy Judge presiding in the Debtors Chapter 11 cases, and any Court having competent jurisdiction to hear appeals therefrom.

Creditor: Any person that holds an Allowed Claim, including governmental units.

Chopin: Chopin Associates, a Florida partnership, one of the Debtors.

Creditors Committees: The Creditors Committee of each of the Debtors, appointed by order of the Bankruptcy Court.

Debtor or Debtors: Gould, MCC, MCLP, Chopin and Holywell, individually and collectively.

Debtors' Plans: The five plans of reorganization, dated February 15, 1985, filed by each of the Debtors'.

Disputed Claim: A claim other than the BNY Debt and the BNY Holywell Loan (i) scheduled by the Debtors as disputed, contingent, undetermined, unliquidated or unknown; or (ii) as to which a timely proof of claim and objection has been filed, and which has not been determined by a Final Order.

Effective Date: The date upon which the Order of Confirmation is no longer subject to appeal, on which date no such appeal is then pending, and on which date all of the conditions to the effectiveness of the Plan expressly set forth in the Plan have been satisfied fully or effectively waived.

Final: Shall mean, with respect to any order, decree or judgment of any Court, that such order, decree or judgement is no longer subject to appeal or rehearing and as to which no appeal, rehearing or motion for rehearing is then pending.

FF&E: The furniture, fixtures and equipment owned by or leased to MCLP pursuant to the FF&E leases.

FF&E Leases: The following four FF&E Leases:

1. Lease, dated May 14, 1981, between MCLP, as Lessee and MCJV, as Lessor covering certain furniture, fixtures and equipment used in the Pavillon Hotel (the "Category A Lease").

2. Lease, dated May 14, 1981, between MCLP, as Lessee and MCJV, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category B Lease").

3. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category C Lease").

4. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities, as Lessor covering certain furniture, fixture and equipment used in the Pavillon Hotel (the "Category D Lease").

Gould: Theodore B. Gould, an individual, one of the Debtors.

Gould Entities: Any of the entities comprising the defined term "Affiliated Creditors", which are directly or indirectly 100% owned by Gould, including but not limited to, Twin Development Corporation, Holywell, Whitehall Security, Inc., Orion Industries, Inc., Orion Engineering Services, Inc., Charleston Center Corp., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG Institute, Racing Club of Florida, Inc., Parkwell Inc., Parkwell of Florida, Inc., Holywell Construction Company, Holywell Management Company of Florida, Inc., HWL Corporation, Peitro Belluschi & Associates, Inc., Holywell Hotels, Inc., Holywell Telecommunications Company, Holywell Trading of Florida, Inc., Holywell Real Estate, Holywell Telecommunications of

Florida, Inc., Holywell Insurance Company, Corpus Christi Associates, Great Western Bank Building, WHA Corp. and Studley-Holywell Assoc., Inc., but not including MCJV.

Gould FF&E Leases: shall mean collectively, the Category C and Category D Leases.

Holywell Corporation: a Delaware corporation, one of the Debtors.

Market Value: \$255,600,000, the appraised market value of Miami Center as of November 15, 1984 as indicated in an appraisal report by Charles V. Failla & Associates, Inc., which report was certified by Charles V. Failla & Associates, Inc., M.A.I.

MCLP: Miami Center Limited Partnership, a Florida limited partnership, one of the Debtors.

MCC: Miami Center Corporation, a Florida corporation, one of the Debtors.

MCJV Claim: shall mean the claim of MCJV filed by O&Y Florida on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity for unpaid rent due under the MCJV FF&E Leases.

MCJV FF&E Leases: shall mean collectively the Category A and Category B Leases.

MCJV Property: Those unimproved parcels of land adjacent to, or near, Miami Center that are owned by MCJV.

MCJV: Miami Center Joint Venture, a Florida partnership, the partners of which are Gould and O&Y Florida.

Miami Center: The parcel of land located in Miami, Dade County, Florida owned by Chopin and leased to MCLP upon which there is constructed an office/hotel complex.

Miami Center Closing Date: 45 days from the Effective Date.

Order of Confirmation: The Order entered by the Court confirming the Plan in accordance with the provisions of Chapter 11 of the Code.

O&Y: shall mean O&Y Equity and O&Y Florida, collectively.

O&Y Equity: Olympia & York Equity Corp., a New York corporation.

O&Y Florida: Olympia & York Florida Equity Corp., a Florida corporation.

O&Y Arbitration: The arbitration proceeding known as *The Matter of Arbitration between Theodore B. Gould, Claimant and Olympia & York Florida Equity Corp. and O&Y Equity Corp., Respondents* (Case No. 13-115-0547-82) which proceeding resulted in an Award, dated June 1, 1984. On or about September 20, 1984 O&Y filed a motion requesting the Court to lift the automatic stay, to remove Gould as managing joint venture partner and to require Gould to deliver documents to effectuate his removal. On October 24, 1984 an Order was entered denying that part of O&Y's Motion requesting the removal of Gould and the delivery of documents for his removal but granting a lifting of the automatic stay for the limited purpose of permitting O&Y or Gould to contest the Award. O&Y subsequently brought an action in the United States District Court for the Southern District of New York (Case No. 82-CIV-5918 (WK)), which action seeks to modify or vacate the Award. A hearing was held on February 1, 1985 before Judge Knapp of the Southern District, who reserved decision on the motion.

O&Y Claim: The Claim filed by O&Y Florida against certain of the Debtors on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity.

Pavillon Hotel: The hotel located in Miami Center.

Parkwell: Collectively, Parkwell Inc., and Parkwell of Florida, Inc., both wholly owned subsidiaries of Holywell.

Pending Litigation: Shall mean the actions described in Exhibit C annexed hereto pending by or against any or all of the Debtors, which Exhibit was taken verbatim from the Debtors' Plans.

Petition Dates: August 22, 1984, the dates on which the Debtors filed their respective Chapter 11 petitions with the Court.

Plan: This Chapter 11 Plan, in its present form, or as it may be amended or modified in accordance with the Code.

Pro-rata: With respect to any distribution on account of any Allowed Claim, in the same proportion as the amount of such Allowed Claim bears to the aggregate amount of all Allowed Claims of its class.

Secured Claim: An Allowed Claim secured by a lien, security interest, judgment or other charge against or interest in property in which any Debtor or the Debtors have an interest, or which is subject to setoff under Section 553 of the Code, not voidable under any section of the Code to the extent of the value (determined in accordance with Section 506(a) of the Code) of the interest of the holder of such Allowed Claim in the Debtors' interest in such property or to the extent of the amount subject to such setoff, as the case may be.

Washington Partnerships: 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Twin Development Corporation, Eleven DuPont Circle Associates and DuPont Land Associates.

Washington Proceeds: The sum of approximately \$32,422,798.87, which was received by Gould and certain Gould Entities from the sale of the Washington Properties and which is being held, subject to Court order, in accounts established at Florida National Bank.

Washington Properties: The real and personal property conveyed by the Washington Partnerships pursuant to the Agreement dated July 26, 1984, as amended, by and between

the Hadid Investment Group, Inc. and the Washington Partnerships.

II. SUBSTANTIVE CONSOLIDATION

Provision for Substantive Consolidation

The Chapter 11 cases filed by the Debtors as Case Nos. 84-01590, 84-01591, 84-01592, 84-01593, and 84-01594 shall on the Effective Date be substantively consolidated pursuant to this Plan and the property of the estates of the Debtors shall be treated as common assets and the Claims of their Creditors deemed Claims against the common assets. As a result of the substantive consolidation of the Debtors, all Claims between and among the Debtors are eliminated by this Plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and MCLP, all claims, if any, relating to or arising out of the Gould FF&E Leases, and all claims of reimbursement, subrogation, and contribution between and among all Debtors.

III. CLASSIFICATION OF CLAIMS AND INTERESTS

For the purposes of distribution under this Plan, Claims and Secured Claims of all Debtors are divided into the following classes:

Class 1—Administration Claims as the same are allowed and ordered paid by the Court.

Class 2—The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 3—The Secured Claim of BNY for the BNY Holywell Loan including interest at the pre-default contract rate to August 31, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 4—All Secured Claims other than the BNY Debt and the BNY Holywell Loan, including interest at the rate of 10% per annum and attorneys' fees, as authorized under applicable law, as the same are allowed and ordered paid by the court.

Class 5—All Claims which are entitled to priority under Code §507 as the same are allowed, approved and ordered paid by the Court, including claims for wages, salaries and commissions entitled to priority under §507(a)(3) and tax claims of governmental units entitled to priority made §506 and §507(a)(6), and including interest on such Claims as authorized by applicable law and allowed any ordered paid by the Court.

Class 6—The Claims of all general unsecured creditors, excluding claims of Affiliated Creditors, and excluding the MCJV Claim and the O&Y Claim.

Class 7—The MCJV Claim and the O&Y Claim.

Class 8—The Claims of Affiliated Creditors.

Class 9—The interest of the Debtors which remain after consummation of this Plan.

IV. MEANS FOR EXECUTION OF THE PLAN

Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of \$255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

- (a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be \$236,587,618.
- (b) BNY would pay the balance of the purchase price in cash (approximately \$19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date. (ii) pay (if requested by BNY, under protest) from such cash the Personal Property taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the personal property taxes for 1985 due to the Miami Center Closing Date. (iii) take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center, except those set forth on Exhibit B attached hereto, and except as provided in Article XI hereof. At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result of the merger of such leases effected by the substantive consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP the FF&E covered by such Leases) and would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase option on the Miami Center Closing Date. On the Effective Date all other liens and encumbrances, including the mechanics liens and judgment liens on Miami Center are transferred and shall attach to the Trust Property, including the Washington Proceeds, subject to the security interests of BNY securing the BNY Holywell Loan. All contracts affecting Miami Center that are not to be assumed will be rejected in accordance with Article XI hereof. Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors.

BNY may elect to retain its mortgages on and security interests in Miami Center after the passing of title; however, upon the passing of title, the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released.

V. CREATION OF TRUST

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as

Trustee of all property of the estates of the Debtors within the meaning of §541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

2. On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however*, to all existing liens, mortgages, security interests and encumbrances.

3. Subject to the provisions of this Plan, and in order to insure the prompt implementation of the Plan, the Trustee shall have full power and authority to:

(a) Enter into the Contract of Sale and to perform all acts that are necessary or appropriate to effect the sale of Miami Center to BNY or its designee in accordance with the Contract of Sale;

(b) Perfect and secure his right, title and interest to the Trust Property;

(c) Reduce all of the Trust Property to his possession and hold the same;

(d) Sell and convert the Trust Property to cash and distribute the proceeds as specified herein;

(e) Manage, operate, improve, and protect the Trust Property as specified herein;

(f) Lease or renew leases;

(g) Grant options to purchase and to contract to sell and sell the property owned by the Trust or any part or parts

thereof for such purchase price and for cash or on such terms as may be appropriate;

(h) Mortgage, pledge or otherwise encumber the Trust Property or any part or parts thereof;

(i) Exchange and re-exchange the Trust Property or any part or parts thereof for other real or personal property;

(j) Release, convey or assign any right, title or interest in or about the Trust Property;

(k) Pay and discharge any mortgage or other lien or encumbrance against the Trust Property and pay and discharge any other costs, expenses or obligations deemed necessary to preserve the Trust Property or any part thereof or to preserve the Trust;

(l) Improve or repair the Trust Property or any part thereof;

(m) Purchase insurance of all kinds sufficient to protect fully the Trust Property and to protect from liability the Trustee, the Creditors Committees and the employee of any member of the Creditors Committees;

(n) Deposit trust funds and draw checks and make disbursements thereof;

(o) Employ attorneys, accountants, engineers, agents, realtors, rental agents, tax specialists and clerical and stenographic assistants as may be deemed necessary, at such compensation as the Trustee may deem reasonable;

(p) Take any action required or permitted by this Plan;

(q) Sue and be sued;

(r) Appoint, remove and act through agents, managers and employees and confer upon them such power and authority as may be necessary or advisable;

(s) Invest funds of the Trust in demand and time deposits in any national bank which is an authorized depository for bankruptcy funds in the federal district in which the Trustee resides or to make temporary investments such as short-term certificates of deposit in such bank or treasury bills;

(t) Prosecute and defend all actions affecting the Trust Property;

(u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them, including but not limited to the discontinuances required by the Contract of Sale;

(v) Waive or release rights of any kind relating to the Trust Property or the Debtors or any of them, including but not limited to the releases required by the Contract of Sale;

(w) Deal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any person owning the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter.

(x) Take no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions.

4. In no case shall any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, or to any part or parts thereof, be obligated to see that the provisions of this Plan or the terms of the Trust have been complied with, or be obligated or privileged to inquire into the authority of the Trustee to act, or to inquire into any other limitation or restriction of the power and authority of the Trustee, but as to any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, the

power of the Trustee to act or otherwise deal with said properties shall be absolute.

5. The Trustee shall receive reasonable compensation for his services subject to the approval of the Court which fee shall be a charge against and paid out of the Trust Property.

6. All costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property, and the Court, upon being satisfied as to the correctness of any and all such costs, expenses and obligations, shall approve and direct the payment thereof prior to a distribution to the holders of unsecured Allowed Claims.

7. No recourse shall ever be had, directly or indirectly, against the Trustee or any of his agents or employees personally by legal or equitable proceedings or by virtue of any statute or otherwise, it being expressly understood and agreed that all liabilities of the Trustee or such agents are employees or under this Trust shall be enforceable only against and be satisfied only out of the Trust Property.

8. The Trustee shall not be liable for any act or failure to act in his capacity as trustee hereunder while acting in good faith and in the exercise of his best judgment, nor shall the Trustee be liable in any event except for his own gross negligence, willful default or misconduct.

9. The Trustee may resign at any time by giving written notice of his intention to do so addressed to the Court, and such resignation shall be effective upon the date provided in such notice.

10. In case of the resignation of the Trustee, a successor shall thereupon be appointed by an instrument in writing, signed and acknowledged (i) prior to the acquisition of Miami Center by BNY, by BNY and the Creditors' Committee and

(ii) subsequent to the acquisition of Miami Center, by the Creditors Committees and delivered to the resigning Trustee, whereupon such resigning Trustee shall convey, transfer and set over to such successor in trust by appropriate instrument or instruments all of the Trust Property then in his possession and held hereunder. Said successor shall thereupon be vested with all the rights, privileges, powers and duties of the Trustee named herein. Each succeeding Trustee may in like manner resign, and another may in like manner be appointed in his place.

11. If BNY or the Creditors Committees at any time desire to terminate the rights of the Trustee then acting under the Trust and appoint a new Trustee in his stead, BNY and the Creditors Committees may do so by a written instrument, addressed to such Trustee then acting; thereupon like conveyances as in the case of resignation of the Trustee shall be made by the Trustee then acting to the newly appointed Trustee, and such new Trustee shall be vested with all the rights, privileges, powers and duties of the Trustee herein named.

VI. TREATMENT OF CLAIMS AND DISTRIBUTION

The cash portion of the Trust Property, together with interest thereon, shall be distributed by the Trustee to satisfy the interest of each Class as defined above (other than the BNY Class 2 Claim) in the following manner and order of priority:

1(a). Class 1 Claims are not impaired. As soon as practicable after the Miami Center Closing Date, all allowed Class 1 Claims which have been incurred prior to the Effective Date and which have been approved by a Final Order of the Court shall be paid by the Trustee in full, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such Class 1 Claims in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(b). Class 1 Claims which have been incurred prior to the Effective Date and which have not been approved by the Court on or before the Miami Center Closing Date shall be paid by the Trustee, in full as soon as practicable after the same have been approved by a Final Order of the Court, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such, in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(c). Class 1 Claims incurred subsequent to the Consummation Date shall be paid by the Trustee, in full, as soon as practicable after the same have been approved by the Creditors Committees unless the holder of any such Class 1 Claim shall have agreed to a different treatment of such Claim, in which case the holder of such Class 1 Claim shall be paid in accordance with such agreement.

2. The Class 2 Claim is impaired. The Class 2 Claim consisting of the principal of the BNY Debt and interest thereon at the pre-default contract rate to the Miami Center Closing Date shall be paid and satisfied in accordance with the provisions of Article IV hereof.

3. The Class 3 Claim is impaired. As soon as practicable after the Miami Center Closing Date, the Class 3 Claim consisting of the principal of the BNY Holywell Loan and interest thereon at the pre-default contract rate shall be paid.

4. Class 4 Claims are impaired. As soon as practicable after the Miami Center Closing Date, all Allowed Class 4 Secured Claims shall be paid in full as to principal and shall be paid interest at the rate of 10% per annum.

5. Class 5 Claims are not impaired. As soon as practicable after the Miami Center Closing Date all Allowed Class 5 Claims shall be paid by the Trustee, in full, in an amount equal to the allowed amount of such Class 5 Claim plus interest, unless the holder of any such Class 5 Claim shall have agreed to a different treatment of such Class 5

Claim, in which case the holder of such Class 5 Claim shall be paid in accordance with such agreement.

6. Class 6 Claims may be impaired if there are not sufficient funds to pay this class in full with interest. As soon as practicable after the Miami Center Closing Date all Allowed Class 6 Claims, after payment of the Allowed Class 1, 2, 3, 4 and 5 claims shall be paid in full or in part Pro Rata.

7. Class 7 Claims may be impaired. As soon as practicable after the Miami Center Closing Date, and the entry of a Final Order or Judgment resolving the O&Y Arbitration, the Allowed Class 7 Claims will be paid from the MCJV Property, if there is a deficiency the claim will be paid to the extent that funds are available after payment of the Allowed Class 1, 2, 3, 4, 5 and 6 Claims.

8. Class 8 Claims are impaired. As soon as practicable after the Miami Center Closing Date and after the payment of Allowed Class 1, 2, 3, 4, 5, 6 and 7 Claims, all Allowed Class 8 Claims shall be paid in full or in part Pro Rata.

9. Class 9 Claims are impaired. As soon as practicable after the Miami Center Closing Date all Allowed Class 7 Claims, after payment of Allowed Class 1, 2, 3, 4, 5, 6, 7 and 8 claims the residue of the estates shall be paid to the Debtors Pro Rata.

VII. DISPUTED CLAIMS

A. *Disputed Claim Fund.* As soon as is practicable after the Miami Center Closing Date, and after payment of the Class 1, 2, 3, and 4 Claims out of Trust Property, the Trustee shall establish the Disputed Claim Fund, in an initial amount reasonably necessary to pay the Debtors' anticipated liability on Disputed Claims.

B. *Investment of Disputed Claim Fund.* The Disputed Claim Fund shall be maintained by the Trustee in a separate bank account, and invested and reinvested at prevailing market rates of interest, for like amounts and periods of

investment, pending the determination of the allowed amount of each Disputed Claim.

C. Distribution from Disputed Claim Funds.

1. *Distribution on Allowed Portion of Claim.* If a Disputed Claim is allowed, in whole or in part, the Trustee shall distribute to the holder of any such Disputed Claim an amount equal to what the holder of such Disputed Claim would have received on the Effective Date if such Disputed Claim were an Allowed Claim.

2. *Distribution of Cash Deposited in Respect of Disallowed Portion of Claim.* If a Disputed Claim is disallowed, in whole or in part, the Trustee shall distribute to the holders of class of creditors that has not paid in full their Pro Rata share of cash theretofore deposited in the Disputed Claim Fund allocable to the disallowed amount of such Disputed Claim.

VIII. DUTIES OF THE DEBTORS

Commencing on the Effective Date and continuing thereafter, the Debtors shall devote such time and attention to the affairs of the estates as are necessary to carry out the provisions of the Plan and to comply from time to time with the reasonable requests of BNY, the Trustee and the Creditors Committees. Without limitation of the foregoing the Debtors shall,

(a) in connection with the sale and transfer of Miami Center as provided in Article IV hereof, take all actions requested by BNY, the Trustee or the Creditors Committees to promptly effectuate the sale thereof, including, without limitation, (i) grant BNY and its attorneys, agents, and accountants full and complete access to the books and records of the Debtors relating in any way to Miami Center and permit BNY to contact any tenants or prospective tenants in Miami Center in connection with the

terms and conditions of their occupancy or their proposed occupancy, (ii) deliver to the Trustee, promptly after the Effective Date, all documents required to be delivered to BNY under the Contract of Sale, including but not limited to, all plans specifications, drawings, as built plans and surveys, plans, inventories of all personal property, operating manuals, licenses service and maintenance contracts, and warranties, (iii) take all steps, execute and deliver all documents, and supply all information necessary or appropriate to close the Contract of Sale and to effectuate a transfer of title to Miami Center as contemplated by Article IV hereof, and the Contract of Sale.

(b) In connection with the distribution to the creditors of the Washington Proceeds and the implementation of the Plan, take all action and supply all information required of Debtors and/or requested by the Creditors Committees or the Trustee in connection with the prompt and timely prosecution of objections to claims filed against the estates, the prompt and speedy defense of litigation against the estates and the execution of all documents and the performance of all acts as may be necessary or desirable to promptly implement and effectuate the distribution to the creditors of the estates, other than Affiliated Creditors and the overall implementation of the Plan. The Debtors shall cooperate fully with the Trustee and Creditors Committees and shall grant to the Trustee and Creditors Committees access to and shall permit the Trustee and Creditors Committees to copy all financial statements, tax returns, books and records of every kind as are within the possession, custody control of any of the Debtors regarding objections to claims against the estate with a view toward the

prompt determination of said objections and a prompt consummation of the Plan.

(c) Take any and all actions requested by BNY, the Trustee on the Creditors Committee which are deemed necessary or appropriate by BNY, the Trustee, or the Creditors Committee to implement and perform this Plan, whether or not specifically enumerated herein.

IX. CONDITION PRECEDENT TO THE EFFECTIVENESS OF THE PLAN

A. The Effective Date shall have occurred.

X. CONDITIONS SUBSEQUENT TO THE EFFECTIVENESS OF THE PLAN

A. The Miami Center Closing Date shall have occurred, in any event, by no later than July 1, 1985, and BNY shall have received by such date the discontinuance and releases required to be delivered to BNY under the Contract of Sale. In the event the conditions subsequent have not been satisfied, at BNY's option this Plan shall no longer be effective, and all obligations and agreements of BNY and its designee shall terminate and be of no effect.

XI. EXECUTORY CONTRACTS

A. The executory contracts and unexpired leases listed in Exhibit D and any other existing executory contracts or unexpired leases relating to Miami Center Phase I with any party not affiliated with any of the Debtors are hereby assumed, unless prior to the Confirmation Date, BNY shall modify this Plan to add or to delete executory contracts or unexpired leases from Exhibit D.

B. Except for executory contracts expressly assumed or rejected prior to sixty (60) days before the date of the Confirmation Order in accordance with 11 U.S.C. § 365, or paragraph A of this Article all executory contracts and

unexpired leases of the Debtors shall be deemed rejected as of the date of the Confirmation Order. Claims for damages resulting from the rejection of executory contracts shall be filed with the Court no later than thirty (30) days prior to the date of the Confirmation Order or be forever barred and precluded from consideration or participation in distributions from the estate. Claims for damages resulting from executory contracts which are deemed rejected as of the date of the Confirmation Order in accordance with this Article shall be filed with the Court or be forever barred and precluded from consideration or participation in distributions from the estate. Objections to any such Claims shall be filed by the Trustee or the Creditors Committees with the Bankruptcy Court within twenty (20) days after the Claim in question has been filed.

XII. MODIFICATION OF THE PLAN

BNY may amend or modify this Plan at any time prior to the entry of the Order of Confirmation, pursuant to Section 1127 (a) of the Code. After the entry of the Order of Confirmation, BNY may, pursuant to Section 1127(b) and (c) of the Code and with approval of the Court, modify or amend the Plan in a manner which does not materially or adversely affect the interests of persons affected by the Plan without having to solicit acceptances of such modification, and may take such steps as are necessary to carry out the purpose and effect of the Plan as modified.

XIII. RESERVATION OF EQUITABLE RIGHTS

Notwithstanding anything to the contrary contained herein, all rights are reserved to any party-in-interest, by appropriate proceeding, to assert any equitable claim for relief from the substantive consolidation provisions of the Plan, if, but only to the extent, such substantive consolidation, materially and adversely affects the rights of such party in interest.

XIV. RETENTION OF JURISDICTION

The Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan had been made and until the entry of final decree, in respect to the following matters:

(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;

(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contingent or unliquidated claims;

(c) to adjudicate all claims or controversies arising during the pendency of the Chapter 11 cases;

(d) to allow or disallow any claim; and

(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII hereof.

Dated: February 26, 1985, as amended as of March 22, 1985.

THE BANK OF NEW YORK

By: /s/

Vice President

EMMET, MARVIN & MARTIN

By: /s/ THOMAS F. NOONE

48 Wall Street

New York, New York 10005

212-422-2974

STEEL, HECTOR & DAVIS

By: /s/ VANCE E. SALTER

Southeast Financial Center
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SHAMPANIER, ZIEGLER &
BARASH, P.A.

By: /s/ S. H. ZIEGLER

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305-538-2851

ATTORNEYS FOR THE BANK OF
NEW YORK

APPENDIX I
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB

CHAPTER 11

In re:

HOLYWELL CORPORATION,

Debtor.

**HOLYWELL CORPORATION'S REPORT ON AMOUNTS
TO BE DEPOSITED BEFORE CONFIRMATION**

Holywell Corporation ("Holywell"), Debtor in Possession, hereby submits a list of creditors who will be paid on confirmation as provided by Holywell's Amended Plan of Reorganization. These creditors are the ones holding claims which will have become "Allowed Claims", as defined in Holywell's Plan, at the time of confirmation. Such claims consist of duly scheduled claims which were not scheduled as contingent, unliquidated or disputed, or claims for which proofs of claims were timely filed and to which Holywell did not file an objection disputing the validity or the amount of the claim. Since the hearing to determine Holywell's objections to claims will not be held until June 12, 1985, those claims that will be the subject of that hearing cannot be considered Allowed Claims under Holywell's Plan for purposes of payment at the time of confirmation. However, Holywell has included as Allowed Claims those claims for which there is agreement between Holywell and the particular creditor on the amount of the claim to be paid and the sole basis of any objection to the claim is that the claimant filed it improperly against one of related Debtors in Possession instead of against Holywell.

Holywell has indicated those creditors who will be paid on confirmation by class and by amount as scheduled or

claimed. In addition, a total amount for each class has been given.

CLASS 1 — ADMINISTRATIVE EXPENSES

The applications for administrative expenses of Kent, Watts & Durden and Touche Ross & Company are claims against Holywell and all of the other Debtors in Possession ("Debtors"). An allocation of these claims for fees and expenses has been made between all of the Debtors based on the allocation of time and costs between the different Debtors' estates provided in the application of counsel for the Debtors such that only Holywell's share of these claims appears below.

<u>NAME OF CREDITOR (APPLICANT)</u>	<u>CLAIMED AMOUNT</u>
Kent, Watts & Durden	\$48,142.59
Touche Ross & Co.	\$ 4,430.85
Blank, Rome, Comisky & McCauley (Counsel for Holywell unsecured creditors' committee)	\$24,865.85
Cadwalder, Wickersham & Taft (Member of Holywell Unsecured Creditors' committee)	<u>\$ 313.85</u>
Total:	<u>\$77,753.14</u>

CLASS 4 — SECURED CLAIM OF BANK OF NEW YORK

The following claim arises from a loan to Holywell from the Bank of New York and is included in Claim #228 filed against Holywell.

<u>NAME OF CREDITOR</u>	<u>SCHEDULED OR CLAIMED AMOUNT</u>
Bank of New York	\$1,750,000.00 plus accrued interest of \$233,211.80 to filing of petition
Total:	<u>\$1,983,211.80</u>

CLASS 6 — JUDGMENTS

See Exhibit "A" attached hereto for a list by creditor, claim number and amount for each of these Allowed Claims to be paid on confirmation.

Total: \$100,502.73

CLASS 7 — NON PRIORITY UNSECURED CREDITORS (\$1,000.00 or less)

See Exhibit "B" attached hereto for a list by creditor, claim number and amount for each of these Allowed Claims to be paid on confirmation.

Total: \$7,801.17

CLASS 8 — NON PRIORITY UNSECURED CREDITORS (over \$1,000.00)

See Exhibit "C" attached hereto for a list by creditor, claim number and amount for each of these Allowed Claims to be paid on confirmation.

Total: \$440,786.69

Synopsis of money to be deposited for confirmation pursuant to Holywell Corporation's plan:

<u>CLASS</u>	<u>AMOUNT NEEDED FOR CONFIRMATION</u>
1	\$ 77,753.14
4	\$1,983,211.80
6	\$ 100,502.73
7	\$ 7,801.17
8	\$ 400,786.69

TOTAL: \$2,610,055.53

I hereby certify that \$14,738,000.00 has been deposited in Kent, Watts & Durden's Trust Accounts in the Florida National Bank at Miami, subject to the Order of this Court.

This amount shall be made available upon confirmation and release by the Court for the payment of claims set out above. The Trust Accounts in which these funds are deposited are:

KENT, WATTS & DURDEN — Theodore B. Gould Trust
Account Account # 0003192139

KENT, WATTS & DURDEN — Holywell Corporation
Trust Account Account # 0003192161

KENT, WATTS & DURDEN — Twin Development Trust
Account Account # 0003168126

DATED: May 13, 1985

KENT, WATTS & DURDEN

/s/ FRED H. KENT, JR.

Fred H. Kent, Jr.

Robert C. Nichols

850 Edward Ball Building

Post Office Box 4700

Jacksonville, Florida 32201

(Attorneys for Debtor/
Disbursing Agent)

VENDOR NAME	MIAMI CENTER LIMITED PARTSHIP	MIAMI CENTER CORP.	MIAMI CENTER CORPORATION	CHOPIN ASSOCIATES	THEODORE CORP.	TOTAL	CLAIM NUMBER
++ SUBTOTAL FOR CLASS NUMBER 70-66	0.00	31257.75	0.00	0.00	0.00	31257.75	74
ECONOMICS LAB	0.00	4555.25	0.00	0.00	0.00	4555.25	383
HELP SERVICES	0.00	58173.11	0.00	0.00	0.00	58173.11	340
BARTON - ASCHWANN	0.00	861.52	0.00	0.00	0.00	861.52	
WESTERN UNION TEL CO	0.00	8655.40	0.00	0.00	0.00	8655.40	446
HOWARD BRANSTROM-LPG	0.00	100502.73	0.00	0.00	0.00	100502.73	
++ Subtotal ++	0.00						

EXHIBIT A

EXHIBIT A

HOLYWELL CORPORATION
CLASS 7 - NON-PRIORITY UNSECURED CLAIMS (\$1,000.00 or Less)

REMARKS OF ALLIED CLAIMS
- BY CLASS

VENOR NAME	REMARK CENTER ADDRESS	HOLYWELL CORP.	REMARK CENTER CORPORATION	COMPEN ASSOCIATES	THE BUCKE COLLS	TOTAL	CLAIM NUMBER
44. ORIGINAL FOR CLASS NUMBER: 84-17							
AMERICAN ACCOUNTING	0.00	871.68	0.00	0.00	0.00	871.68	
AMERICAN CORP.	0.00	814.53	0.00	0.00	0.00	814.53	79
BARNEY BUSINESS FIRM	0.00	544.79	0.00	0.00	0.00	544.79	
CORLEY'S FLORIST	0.00	79.28	0.00	0.00	0.00	79.28	
D.L. ROSE-ONE INC.	0.00	425.48	0.00	0.00	0.00	425.48	
EASTERN BUSINESS INC	0.00	16.44	0.00	0.00	0.00	16.44	
GERBERT OFFICE FIRM	0.00	964.98	0.00	0.00	0.00	964.98	287
OF AMERICAN CORP.	0.00	399.44	0.00	0.00	0.00	399.44	
HILLMAN ELECTRIC	0.00	961.50	0.00	0.00	0.00	961.50	
THE RECTOR COMPANY	0.00	215.48	0.00	0.00	0.00	215.48	
RECTOR-BROOKS CORP.	0.00	549.27	0.00	0.00	0.00	549.27	
PIREY BROS	0.00	463.12	0.00	0.00	0.00	463.12	
PAKES & SON P.B.	0.00	17.43	0.00	0.00	0.00	17.43	279
COE GROUP	0.00	444.53	0.00	0.00	0.00	444.53	
VIRGINIA MARINE	0.00	24.75	0.00	0.00	0.00	24.75	
WORLD WIDE DELIVERY	0.00	100.00	0.00	0.00	0.00	100.00	
WESTERN UNION INC	0.00	23.46	0.00	0.00	0.00	23.46	
WHEEL CORPORATION	0.00	116.79	0.00	0.00	0.00	116.79	
WINE LABORATORIES	0.00	139.25	0.00	0.00	0.00	139.25	
44. Subtotal - 44	0.00	1801.17	0.00	0.00	0.00	1801.17	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 14 day of May 1985, to the parties listed below.

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APPENDIX J
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Case No. 85-3230-Civ-ATKINS]

OLYMPIA & YORK FLORIDA EQUITY CORP. and
MIAMI CENTER JOINT VENTURE,

Appellants,

vs.

THE BANK OF NEW YORK,

Appellee.

MEMORANDUM OPINION

Olympia & York Florida Equity Corporation (O&Y), as a general partner of Miami Center Joint Venture (MCJV), appeals from the bankruptcy court's Confirmation Order confirming a Chapter 11 plan of reorganization initiated by five debtors. Competing plans of reorganization were submitted to the creditors who rejected the debtors' plans and adopted the Bank of New York's (Bank's) plan. O&Y/MCJV asserts that its claim was improperly classified under this plan.

Pursuant to 11 U.S.C. § 1129(b), the court may confirm a plan even though a class has rejected it if all other requirements of § 1129(a) have been fulfilled and "the plan does not discriminate unfairly, and is fair and equitable," with respect to that class. *Id.* O&Y/MCJV, as the only creditors in Class 7, voted to reject the plan. Therefore, the question presented is whether the plan fulfilled the requirements of § 1129(b).

I. STATEMENT OF THE CASE

A. *The Parties and Their Respective Interests*¹

The five debtors include the Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, a Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Intercontinental Hotel (known as the "Pavillon" during the Gould group's ownership), retail space between them known as the "Podium," and an adjoining parking garage (collectively known as the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

MCJV is a Florida general partnership formed by debtor Gould and O&Y. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the existing Miami Center Project. Gould and O&Y, as the only partners, originally planned to construct Phases II and III of Miami Center on those lots, but disputes and arbitration between the two partners has precluded further construction or development.

Over 400 other creditors have or had an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by the bankruptcy

court, and have been active for the Holywell, MCLP, and MCC estates.

B. *General Background Information*

During the summer of 1984, the Bank initiated foreclosure proceedings in state court after declaring the debtor's mortgage loans on the Miami Center to be in default. The debtors quickly responded by filing their voluntary petitions for reorganization on August 22, 1984. During the Chapter 11 reorganization proceedings, the debtors and the Bank filed competing reorganization plans. The various creditors' committees and individual creditors rejected the debtors' plans and adopted the Bank's plan, although it was rejected by the impaired classes 7-9. This plan was then confirmed by the bankruptcy court over the Class 7 creditors' objection pursuant to 11 U.S.C. § 1129(b) (1979).

Several appeals were taken from the various bankruptcy proceedings. Two of these appeals were closely related to this one. In one, *Bank of New York v. Olympia & York Florida Equity Corp.*, No. 85-3430-Civ- ATKINS (June 23, 1986), the Bank sought reversal of a final judgment and related orders of the bankruptcy court in an adversary proceeding. The bankruptcy court found that certain lease agreements relating to furniture, fixtures, and equipment (FF&E) within the Miami Center project were "true leases." After reviewing the bankruptcy court's orders and the lease agreements, I affirmed. This action was significant because it formed the foundation for O&Y/MCJV's priority claims as the owner/lessor of the FF&E.

Another appeal went before Judge Aronovitz in which he was asked to review the same confirmation order as it related to other classes under the Bank's plan. After reviewing the confirmation order, he found that the bankruptcy court failed to enter clear and concise findings of fact and conclusions of law which would support its order; therefore, he remanded the case. Following the proceedings

on remand, Judge Aronovitz affirmed the amended confirmation order as it related to those aspects of the Bank's plan on appeal before him.

Having resolved the "true lease" issue which established the nature of O&Y/MCJV's claim as to the FF&E, I carefully reviewed the confirmation order as it related to Class 7 of the plan. Like Judge Aronovitz, I found that it was necessary to remand the case for a more detailed order clearly elucidating the basis for the bankruptcy court's decision to place O&Y/MCJV's claim in class 7 of the plan.² On November 10, 1986, the bankruptcy court concluded its remand proceedings and entered its Order on Remand in which it adopted the proposed findings of fact and conclusions of law submitted by the Bank.³ Thus, the initial Confirmation Order, as amended by the adoption, *nunc pro tunc*, of the

²Remand proceedings were appropriate under *Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206 (5th Cir. 1983). There, the district court evaluated the record to find sufficient findings of fact to satisfy each of *Mobile's* three elements for equitable subordination. The Fifth Circuit remanded the case saying:

These findings, though perhaps inherent in the bankruptcy court's ruling, were not enunciated. Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the trustee has discharged his burden of proof thereunder.

Id. at 212 (emphasis added).

³O&Y/MCJV challenges the propriety of the bankruptcy judge's verbatim adoption of the Bank's proposed findings and conclusions, and asserts that the "blanket adoption" of one party's findings and conclusions indicates that the court failed to conduct a thorough, independent analysis of the evidence and the law. While this practice has been severely criticized, see *Cabriolet Porsche-Audio v. American Honda Motor Company*, 773 F.2d 1193, 1198 n.2 (11th Cir. 1985), it is permissible. See *Anderson v. Bessemer City*, 470 U.S. ___, 105 S.Ct. 1504 (1985). Nevertheless, such a practice invites particularly close scrutiny of the findings in light of the record.

explicit findings of fact and conclusions of law, constitutes the foundation for O&Y/MCJV's appeal.⁴

C. The Nature of the O&Y/MCJV Claim

The appeal before this court concerns only the rights and claims of MCJV, prosecuted by O&Y as its general partner, and managing venturer relating to the FF&E leases. Originally, O&Y filed separate claims as a creditor; however, in conjunction with the Trustee's consent to entry of the final modified arbitration award, O&Y issued a formal release of all its own claims against debtor Gould.⁵ O&Y/MCJV asserts that it has priority claims for the market value of the FF&E, the cumulative defaulted rental payments and late charges accrued from March 1, 1983 to October 10, 1985, and defaulted rental payments and late charges from October 10, 1985.⁶

⁴On remand, the bankruptcy court correctly determined that it was not called upon to alter or enhance the record. I simply wanted a more detailed explanation concerning the basis for the court's approval of the plan. Therefore, the record, as it stood at the time of confirmation, must support the amended findings.

⁵O&Y and Gould initiated arbitration proceedings against each other in 1982 based upon their conflicting views regarding the operation of MCJV. The bankruptcy court permitted O&Y to pursue its rights under the relevant arbitration statutes and to proceed to an award in a court of competent jurisdiction, although it recognized that these proceedings could affect O&Y's and Gould's interests in MCJV. The final modified award was executed by the arbitrators on June 30, 1986 and entered as a judgment in the Florida Circuit Court on July 10, 1986.

⁶MCLP was supposed to make rental payments to MCJV under the lease agreement as of March 1, 1983. On October 10, 1985, the trustee transferred his interest in the FF&E to the Bank and its designated transferee.

II. DISCUSSION

This appeal presents many complex legal issues. Over 400 parties struggled through the bankruptcy proceedings, under that court's supervision, attempting to make the best of an undesirable situation. The plan has been substantially consummated, and appears to have been successfully implemented.⁷ Nevertheless, O&Y/MCJV vehemently objects to the placement of its claim concerning the FF&E into class 7 of the plan. Conversely, the Bank argues that this classification was eminently correct, because it satisfied all statutory requirements under the Code.

A. *Standard of Review*

A district court must accord substantial deference to the bankruptcy court's findings of fact, and should reverse only when they are "clearly erroneous." *Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206, 209 (5th Cir. 1983); Bankruptcy Rule 8013. Moreover, the bankruptcy court's balancing of equities in analyzing the plan's fairness is a factual process, therefore, the court's determination on this point is also subject to the "clearly erroneous" standard of review. *Danning v. General Motors Acceptance Corp. (In re Jules Meyers Pontiac, Inc.)*, 779 F.2d 480, 482 (9th Cir. 1985). Conclusions of law, however, are subject to plenary review. *Machinery Rental v. Herpel (In re Multiponics)*, 622 F.2d 709, 713 (5th Cir. 1980) (hereinafter referred to as "Multiponics").

B. *Classification Under The Code*

A Chapter 11 plan of reorganization may involve the sale of all or substantially all of the debtor's assets. 11 U.S.C.A.

⁷The claims classified under the plan from Class 1 to Class 6 have either been paid in full or funds have been reserved for the disputed items. In addition, in the most recent reports, the Liquidating Trustee estimated that approximately \$3 million will be available to satisfy the remaining claims.

§ 123(b)(4) (1979). After all, one of the primary goals of the bankruptcy code is to effectuate an equitable distribution of the debtor's assets in satisfaction of its debts. *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 698 (5th Cir. 1977). To achieve the goal, the plan must group the claims or interests by classes. 11 U.S.C.A. §§ 1122, 1123 (1979)*; Bankruptcy Rule 3013. "The classes which hold priority claims must be specially organized and full payment is mandatory although the payment may be deferred." R. Aaron, *Bankruptcy Law Fundamentals*, § 1.04 at 1-22 (1986) (footnote to citations omitted).

The Bank urges that its plan is acceptable because the classification of the MCJV lease claims is fair and equitable,

*11 U.S.C.A. § 1122(a) provides:

Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

11 U.S.C.A. § 1123 provides (in pertinent part):

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2) or 507(a)(7) of this title and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation

be referred to collectively as the "Stock Collateral"; 10 shares, constituting all of the issued and outstanding capital stock of Twin Development Corp.; 10 shares, constituting all of the issued and outstanding capital stock of HWL Corporation; 10 shares, constituting all of the issued and outstanding capital stock of Parkwell, Inc.; 10 shares, constituting all of the issued and outstanding capital stock of Orion Industries, Inc. (d/b/a Whitehall Industries, Inc.); 10 shares, constituting all of the issued and outstanding capital stock of Holywell Construction Company (CMI, Inc.); 10 shares, constituting all of the issued and outstanding capital stock of Miami Center Corp.; 10 shares, constituting all of the issued and outstanding capital stock of Charleston Center Corp.; 10 shares, constituting all of the issued and outstanding capital stock of Pietro Bulluschi and Associates, Inc.; 66.66 shares, constituting 66⅔% of the issued and outstanding capital stock of NHA Corporation; 10 shares, constituting 50% of the issued and outstanding capital stock of Studley-Holywell Associates, Inc;

(b) all right, title and interest of the Company (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to the Company as a general or limited partner from 1333 New Hampshire Associates, which partnership owns certain real property located at 1333 New Hampshire Avenue, N.W. Washington, D.C..

(c) all right, title and interest of the Company (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to the Company as a general or limited partner from 1300 North 17th Street Associates, which partnership owns certain real property located at 1300 North 17th Street, Arlington Virginia.

(d) all right, title and interest of the Company (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to the Company as a general or limited partner of Eleven Dupont Circle Associates, which partnership owns certain real property located at 11 Dupont Circle, Washington, D.C..

(e) all right, title and interest of the Company (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to the Company as a general or limited partner of 1616 Reminc Limited Partnership, which partnership owns certain real property located at 1616 Fort Myer Drive, Arlington, Virginia.

(f) all right, title and interest of the Company (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to the Company as a general or limited partner of Dupont Land Associates, which partnership owns certain real property located at 11 Dupont Circle, Washington, D.C.

(g) all amounts due or to become due under or as a result of any assignment or beneficial assignment or other transfer of any partnership or other interest in those partnerships set forth in subparagraphs b, c, d, e and f of this Paragraph 2.

All of the interests of the Company set forth in subparagraphs a, b, c, d, e, f and g of this Paragraph 2 shall hereinafter be referred to collectively as the "Collateral".

3. *Covenants and Agreements of the Company:* The Company covenants and agrees that so long as any of the Obligations hereby secured remain unpaid or undischarged that:

(a) The assignment and grant of security interest in the Collateral to the Bank will be clearly marked on the books of the Company as assigned to the Bank.

(b) The Company will not hypothecate or further pledge, assign, or otherwise create or suffer to exist a Lien on the Collateral in favor of anyone other than the Bank as provided herein and will promptly deliver or cause to be delivered to the Bank the Collateral upon its receipt or right to receive same.

(c) The Company authorizes and empowers the Bank to require the Company to notify, or itself to notify, either in its own name or in the name of the Company, any Person to whom the Bank deems notice is necessary, of the fact of the assignment and grant of security interest provided herein.

(d) The Company authorizes and empowers the Bank to ask for, demand, collect, institute and maintain suits for, receive, compound, compromise and give acquittance for any and all sums which are now or may hereafter constitute Collateral, to enforce payment thereof either in its own name or in the name of the Company and to make such endorsements in its own name or in the name of the Company as it shall deem necessary with respect thereto, and to collect any instruments tendered or received by it in connection therewith.

(e) The Company agrees that under no circumstances shall the Bank be under any duty whatsoever to take any steps necessary to preserve rights against prior or third parties, and the Bank's rights against the Company and with respect to the Collateral shall continue unimpaired notwithstanding. The Bank shall not be responsible to the Company or any of its Subsidiaries for any loss or damage resulting from the Bank's failure to collect monies or other Property constituting Collateral, or resulting from other action herein authorized and taken or not taken by the Bank.

The Bank shall have no duty to act with respect to any of the foregoing.

(f) The Company authorizes the Bank at the Company's expense to file one or more financing statements and continuation statements to perfect and continue the perfection of the assignment and security interest herein provided, and the Company agrees to pay all costs of file, title or other searches made by the Bank with respect to the Company or any of its Subsidiaries.

(g) In the event that all or any part of the shares constituting the Stock Collateral are lost, destroyed or wrongfully taken while such shares are in the possession of the Bank, the Company agrees that it will issue or cause to be issued new shares in place of the lost, destroyed or wrongfully taken shares upon request therefor by the Bank and without the necessity of any indemnity bond or other security other than the Bank's agreement of indemnity therefor.

(h) The Company will not issue or permit there to be issued any additional shares of the Company or any of its Subsidiaries or redeem, seek to redeem or permit there to be redeemed any part of the shares of the Company or any of its Subsidiaries.

(i) The Company will not itself, or permit any other Person to, alter, modify, amend or otherwise change the Partnership Agreement, articles of incorporation or by-laws.

(j) The Company will at all reasonable times and from time to time allow the Bank to examine, inspect or make extracts from the books, ledgers, reports, correspondence and other records of the Company and its Subsidiaries.

(k) The Company will deliver upon demand to the Bank copies of any documents, correspondence or records relating to the Collateral.

(l) The Company will not (i) sell or otherwise dispose of, or grant an option with respect to, the Collateral or (ii) create or permit to exist any Lien upon or with respect to the Collateral, except for the assignment and security interest provided herein.

(m) The Company will at any time and from time to time promptly do, perform, file, record, make, execute, acknowledge and deliver all such acts, deeds, things, notices, instruments and financing statements as may be necessary or desirable or as the Bank may require in order more completely to vest in and assure to the Bank its assignment and security interest in the Collateral and the enforcement of and giving effect to its rights, remedies and powers hereunder.

(n) The Company will not change the location of the Company's chief executive office or the place in which it keeps and maintains its books and records.

(o) A true and accurate copy of the Partnership Agreements together with all amendments thereto, and true and accurate copies of the articles of incorporation and by-laws of the entities listed in subparagraph (a) of Paragraph 2, together with all amendments thereto have been delivered to the Bank.

(p) The Company will not enter into any new agreement or arrangement with any Person which in any manner would adversely affect the Collateral or the interest of the Bank therein.

(q) With respect to the Collateral, the Bank shall be under no duty to send notices, perform services, exercise any rights of collection, enforcement, or conversion, or exchange, vote, pay for insurance, taxes or other charges or take any action of any kind in connection with the management thereof and its only duty with respect thereto shall be to use reasonable care while the Collateral is in its actual

possession, which shall not include any steps necessary to preserve rights against prior or third parties.

(r) The Company will maintain, and cause each Subsidiary to maintain, its partnership or corporate existence, as the case may be, in good standing, and qualify and remain qualified to do business as a foreign corporation in each jurisdiction wherein the character of the Property owned or leased by it therein or in which the transaction of its business therein makes such qualification necessary, and cause each Subsidiary so to do.

(s) The Company will pay and discharge when due, and cause each Subsidiary so to do, all taxes, assessments and governmental charges, and levies upon or with respect to the Company and each Subsidiary.

(t) The Company will maintain, and cause each Subsidiary to maintain, insurance with financially sound insurance carriers on such of its Property, against such risks, and in such amounts as is customarily maintained by similar businesses.

(u) The Company will give prompt written notice to the Bank if: (i) any obligation of the Company or any Subsidiary for borrowed money, or if any other indebtedness of the Company or any Subsidiary, is declared or shall become due and payable prior to its stated maturity, or called and not paid when due, (ii) the holder of any note or other evidence of indebtedness, certificate or Security evidencing any such obligation, or any obligee with respect to any other indebtedness of the Company or any Subsidiary, has the right to declare such obligation due and payable prior to its stated maturity, or (iii) there shall occur and be continuing an Event of Default hereunder.

4. *Representations and Warranties of the Company.* The Company represents and warrants and, so long as any of the Obligations hereby secured remains unpaid or undischarged, shall be deemed continuously to represent and warrant that:

(a) The Company and each of its Subsidiaries is duly organized, validly existing, in good standing under the laws of the jurisdiction of its incorporation or formation, has all requisite power and authority to own its Property and to carry on its business as now conducted, and is in good standing and authorized to do business in each jurisdiction in which the character of the Property owned and leased by it therein or the transaction of its business makes such qualification necessary.

(b) The Company has full power and authority to enter into, execute, deliver and carry out the terms of this Agreement, all of which have been duly authorized by all proper and necessary corporate action. No consent or approval of, or exemption by, shareholders is required to authorize, or is required in connection with the execution, delivery and performance of, this Agreement, or is required as a condition to the validity or enforceability of this Agreement.

(c) This Agreement constitutes the valid and legally binding obligations of the Company enforceable in accordance with its terms.

(d) No provision of the certificate of incorporation, by-laws or preferred stock, if any, of the Company, and no provision of any existing mortgage, indenture, contract, agreement, statute (including, without limitation, any applicable usury or similar law), rule, regulation, judgment, decree or order binding on the Company or affecting the Property of the Company conflicts with, or requires any consent under, or would in any way prevent or restrict the execution, delivery or carrying out of the terms of, this Agreement and the taking of any such action will not constitute a default under, or result in the creation or imposition of, or obligation to create, any Lien upon the Property of the Company pursuant to the terms of any such mortgage, indenture, contract or agreement.

(e) No representation or warranty contained herein and no certificate or report furnished or to be furnished by the Company in connection with the transactions contemplated hereby, contains or will contain a misstatement of material fact, or omits or will omit to state a material fact required to be stated in order to make the statements herein or therein contained not misleading in the light of the circumstances under which made.

(f) No part of the Collateral is subject to dispute, objection, setoff, counterclaim or complaint by any Person.

(g) The Company has not heretofore assigned, granted a security interest in or otherwise encumbered any part of the Collateral or any rights or interests therein or thereto, and the Company is the present and sole owner of the Collateral free of any Lien except for the assignment and security interest provided herein, or except as disclosed and consented to by Bank in writing.

(h) No applicable law or governmental regulation and nothing in any agreement between the Company and any other Person purports to forbid, restrict or subject to conditions precedent the granting of an assignment of or a security interest in any of the Collateral.

(i) The assignment of and grant of a security interest in the Collateral pursuant to this Agreement creates a valid and perfected present and first priority assignment and security interest in the Collateral subject to no other Lien.

(j) No authorization, approval, or other action by, and no notice to or filing with, any governmental authority or regulatory body is required (i) for the assignment by the Company of the Collateral pursuant to this Agreement, (ii) for the execution, delivery or performance of this Agreement by the Company or (iii) for the exercise by the Bank of the rights provided for in this Agreement or the remedies in respect of the Collateral pursuant to this Agreement.

(k) The Company's chief executive office is located at 1300 North 17th Street, Arlington, Virginia which is where all books and records of the Company and its Consolidated Subsidiaries are (hereinafter defined) kept and maintained.

(l) The Company has only the Subsidiaries set forth in Paragraph 1 hereof. The shares of each corporate Subsidiary owned by the Company or any Subsidiary are owned free and clear of any Liens and are validly issued and fully paid for. The interest in each non-corporate Subsidiary owned by the Company or any Subsidiary is owned free and clear of any Liens.

(m) There are no actions, suits, arbitration proceedings or investigations (whether or not purportedly on behalf of the Company or any Subsidiary) pending or, to the knowledge of the Company, threatened against the Company or any Subsidiary, or maintained by the Company or any Subsidiary, in law or in equity before any governmental body which might result in a material adverse change in the financial condition, Property or operations of the Company or any Subsidiary except as set forth in Exhibit A attached hereto.

(n) The Company and each Subsidiary has filed or caused to be filed all tax returns required to be filed, and has paid, or has made adequate provision for the payment of, all taxes shown to be due and payable on said returns or in any assessments made against it, and no tax Liens have been filed and no claims are being asserted with respect to such taxes.

5. *Custody and Preservation.* The Bank shall be deemed to have exercised reasonable care in the custody and preservation of the Collateral in its possession if the Collateral is accorded treatment substantially equal to that which the Bank accords its own Property, it being understood that the Bank shall not have any responsibility for taking any steps to preserve rights against any prior or third parties with respect to any of the Collateral.

6. *Performance by Bank.* If the Company shall default in the performance of any of the provisions hereof on the Company's part to be performed, the Bank may (but is not obligated to) perform same for the Company's account and any monies expended in so doing shall be chargeable with interest at a rate per annum equal to 3 percent over the prime rate of The Bank of New York as announced to be in effect from time to time, but in no event shall such interest rate exceed the maximum rate permitted by law. All such monies and interest shall be payable on demand and be secured by the Collateral. The foregoing shall not limit the Company's obligations or the Bank's rights under this Agreement.

7. *Events of Default:* The following shall each constitute an "Event of Default" hereunder:

(a) The occurrence of a default under the Guarantee; or

(b) The occurrence of a default under that certain Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement of even date herewith by and among Chopin, MCLP and the Bank, to be recorded in the Clerk's Office, Dade County, Florida; or

(c) If the Company shall fail to perform or observe any covenant or agreement on its part to be performed or observed under this Agreement; or

(d) If any representation or warranty of the Company contained herein or in any certificate, report, opinion or notice delivered or to be delivered by the Company pursuant hereto shall prove to have been incorrect or misleading in any material respect when made; or

(e) The occurrence of a default by Chopin or MCLP under any note or mortgage held by the Bank; or

(f) The occurrence of a default under that certain Assignment of even date herewith made by 1333 New Hampshire Associates, NHA Corporation, Eleven Dupont

Circle Associates, Dupont Land Associates, Holywell and Gould to the Bank; or

(g) The occurrence of an Event of Default under and as defined in that certain Mortgage, Assignment of Leases and Rents made or to be made by Charleston Center Corporation and delivered to the Bank; or

(h) The occurrence of a default under the BLA or LLA made by MCLP and Chopin, respectively, and assigned to the Bank; or

(i) If Theodore B. Gould shall die or be declared an incompetent.

8. *Remedies on Default:* Upon the occurrence of an Event of Default, the Bank may proceed to enforce its rights hereunder by suit in equity, action at law and/or other appropriate proceedings, whether for payment or the specific performance of any covenant or agreement contained in this Agreement. In addition to all of the rights and remedies provided for in this Agreement and all of the rights and remedies allowed by law, the Bank shall have the rights and remedies of a secured party under the Uniform Commercial Code as in effect at that time and, without limiting the generality of the foregoing, the Bank may immediately, without demand or performance and without notice of intention to sell or of the time or place of sale or of redemption or other notice or demand whatsoever to the Company, all of which are hereby expressly waived, and without advertisement, sell at any time or from time to time, at public or private sale, grant options to purchase or otherwise realize upon, in the States of New York, Florida or elsewhere, the whole or any part of the Collateral. At any such sale or other disposition, the Bank, its assigns, officers or nominees, may purchase the whole or any part of the Collateral free from any right of redemption on the part of the Company, which right is hereby waived and released. In the event of a sale or other disposition of any of the Collateral, the Bank may

apply the proceeds thereof to the satisfaction of the Bank's reasonable attorneys' fees, legal expenses, and other costs and expenses incurred in connection with the selling of any of the Collateral. Without precluding any other methods of sale, the sale of any of the Collateral shall be deemed to have been made in a commercially reasonable manner if conducted in conformity with reasonable commercial practices or banks disposing of similar property sold as collateral. To the extent permitted under applicable law, full power and authority are hereby given to the Bank to sell, assign, and deliver the whole of the Collateral or any part thereof, at any time and from time to time, at any broker's board or at any sale, at the Bank's option, and no delay on the Bank's part in exercising any power of sale or any other rights or options hereunder, and no notice or demand which may be given to or made upon the Company by the Bank with respect to any power of sale or other right or option hereunder shall constitute a waiver thereof, or limit or impair the Bank's right to take any action or to exercise any power of sale or any other rights hereunder without notice or demand, or prejudice the Bank's rights as against the Company in any respect.

Upon the occurrence of an Event of Default, any or all shares of the Stock Collateral may, upon compliance with any applicable provisions of law, be registered in the name of the Bank or its nominee, as the Bank shall, in its sole discretion, decide. Thereafter, the Bank or such nominee may, without notice, exercise all voting and other shareholder rights at any meeting thereof, and exercise any and all rights of conversion, exchange, subscription or any other rights, privileges or options pertaining to any shares of the Stock Collateral as if the Bank or such nominee were the absolute owner thereof, including, without limitation, the right to exchange, at the Bank's or such nominee's discretion, any and all of the Stock Collateral upon the merger, consolidation, reorganization, recapitalization or other readjustment of or involving the Company or upon the exercise by the Company or the Bank of any right, privilege or option pertaining to

any shares of the Stock Collateral. In connection therewith, the Bank or such nominee may deposit and deliver any and all of the Stock Collateral with any committee, depository, transfer agent, registrar or other designated agent upon such terms and conditions as the Bank or its nominee may determine, all without liability, except to account for property actually received by it. The Bank or its nominee shall have no duty to exercise any of the aforesaid rights, privileges or options, and shall not be responsible for any failure to do so or delay in so doing.

The Company hereby expressly waives any presentment, demand, protest, notice of protest or other notice of any kind. The Company hereby further expressly waives and covenants not to assert any appraisement, valuation, stay, extension, redemption or similar laws, now or at any time hereafter in force which might delay, prevent or otherwise impede the performance or enforcement of this Agreement.

Except as otherwise specifically provided by the provisions hereof, the Bank may, at any time and from time to time, waive in whole or in part, absolutely or conditionally, any Event of Default which shall have occurred hereunder. Any such waiver shall be for such period and subject to such conditions or limitations as shall be specified in any such notice. In the case of any such waiver, the rights of the Bank under this Agreement shall be otherwise unaffected, and any Event of Default so waived shall be deemed to be cured and not continuing to the extent and on the conditions or limitations set forth in such waiver, but no such waiver shall extend to any subsequent or other Event of Default, or impair any right, remedy or power consequent thereupon.

9. *Sale of Stock Collateral:* The Company recognizes that the Bank may be unable or may not desire to effect a public sale of all or part of the Stock Collateral by reason of certain prohibitions and restrictions contained in the Securities Act of 1933, as amended, and may be compelled or deem it desirable to resort to one or more private sales

to a restricted group of purchasers who will be obligated to agree, among other things, to acquire the Stock Collateral for their own account, for investment, and not with a view to the distribution or resale thereof. The Company agrees that private sales so made may be at prices and on terms less favorable to the seller than if the Stock Collateral were sold at public sales and that the Bank has no obligation to delay sale of any of the Stock Collateral for the period of time necessary to permit the issuer or maker of the Stock Collateral, even if such issuer or maker would agree, to register the Collateral for public sale under the Securities Act of 1933, as amended. The Company agrees that private sales made under the foregoing circumstances shall be deemed to have been made in a commercially reasonable manner and for a commercially reasonable price.

10. *Voting and Other Rights.* Unless and until an Event of Default shall occur hereunder, the registered owners of the Stock Collateral shall be entitled to vote the Stock Collateral and to give consents, waivers and ratifications in respect of the Stock Collateral, provided, however, that the Company shall not take any action which would be inconsistent with, or violate any provision of, this Agreement.

11. *Notices; Manner of Delivery.* Except as otherwise specifically provided herein, all notices, requests, consents, demands, waivers and other communications hereunder shall be in writing and shall be mailed by first-class mail or delivered in person, and all statements, reports, documents, certificates and papers to be delivered hereunder shall be mailed by first-class mail or delivered in person, in each case to the respective parties as follows:

the Company:

Holywell Corporation
1300 North 17th Street
Arlington, Virginia 22209
Attention: Theodore B. Gould,
President

the Bank:

The Bank of New York
48 Wall Street
New York, New York 10015
Attention: Douglas W. Duval,
Vice President

with a copy to:

Emmet, Marvin & Martin
48 Wall Street
New York, New York 10005
Attention: Leonard C. Pojednic, Esq.

or to such other Person or address as a party hereto shall designate to the other parties hereto from time to time in writing forwarded in like manner. Any notice, request, consent, demand, waiver or communication given in accordance with the provisions of this paragraph shall be conclusively deemed to have been received by a party hereto and to be effective on the day on which delivered to such party at its address specified above or, if sent by first class mail, on the third Business Day after the day when deposited in the mail, postage prepaid, and addressed to such party at such address, provided that a notice of change of address shall be deemed to be effective when actually received.

12. *Other Provisions:*

(a) *No Waiver of Rights by the Bank.* No failure on the part of the Bank to exercise, and no delay in exercising, any right or remedy hereunder shall operate as a waiver

thereof, nor shall any single or partial exercise by the Bank of any right, remedy or power hereunder preclude any other or future exercise thereof, or the exercise of any other right, remedy or power. The rights, remedies and powers provided herein are cumulative and not exclusive of any other rights, remedies or powers which the Bank may otherwise have. Notice to or demand on the Company in any circumstance in which the terms of this Agreement do not require notice or demand to be given shall not entitle the Company to any other or further notice or demand in similar or other circumstances or constitute a waiver of the rights of the Bank to take any other or further action in any circumstances without notice or demand.

(b) *Headings, Plurals.* Paragraph and subparagraph headings have been inserted herein for convenience only and shall not be construed to be a part of this Agreement. Unless the context otherwise requires, words in the singular number include the plural, and words in the plural include the singular.

(c) *Counterparts.* This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute one agreement. It shall not be necessary in making proof of this Agreement or of any document required to be executed and delivered in connection herewith to produce or account for more than one counterpart.

(d) *Severability.* Every provision of this Agreement is intended to be severable, and if any term or provision hereof shall be invalid, illegal or unenforceable for any reason, the validity, legality and enforceability of the remaining provisions hereof shall not be affected or impaired thereby, and any invalidity, illegality or unenforceability in any jurisdiction shall not affect the validity, legality or enforceability of any such term or provision in any other jurisdiction.

(e) *Successors and Assigns; Survival of Representations and Warranties.* This Agreement shall be binding upon and inure to the benefit of the Bank and the Company and their respective successors and assigns. All covenants, agreements, warranties and representations made herein and in all certificates or other documents delivered in connection with this Agreement by or on behalf of the Company shall survive the execution and delivery hereof and thereof, and all such covenants, agreements, representations and warranties shall inure to the respective successors and assigns of the Bank whether or not so expressed.

(f) *Applicable Law.* This Agreement is being delivered in and is intended to be performed in the State of New York and shall be construed and enforceable in accordance with, and be governed by, the internal laws of the State of New York without regard to principles of conflict of laws.

(g) *Amendment and Waivers.* This Agreement may not be amended or modified nor may any term or provision of this Agreement be waived or any consent be given hereunder except pursuant to a written instrument signed by the party or parties against whom enforcement of such amendment, modification, waiver or consent is sought.

(h) *Expenses of Bank.* The Company agrees to pay on demand all fees (including, without limitation, all lawyers' and accountants' fees, travel expenses, and other expenses of the Bank) incurred by the Bank in connection with the preparation, execution, administration and enforcement of this Agreement and the Guarantee, whether or not suit is instituted.

IN WITNESS WHEREOF, the Company and the Bank have caused this Assignment and Security Agreement to be duly executed as of the date first above written.

HOLYWELL CORPORATION

By: /s/ THEODORE B. GOULD

Theodore B. Gould, President

THE BANK OF NEW YORK

By: /s/ ROBERT E. WASH

Vice President

EXHIBIT A
List of Lawsuits

EXHIBIT "C"

AMENDMENT NO. 1

AMENDMENT NO. 1, dated October 14th, 1983, to the ASSIGNMENT AND SECURITY AGREEMENT, dated June 23, 1983, by and between HOLYWELL CORPORATION, a Delaware corporation (the "Company"), and THE BANK OF NEW YORK (the "Bank") (the "Agreement").

RECITALS

A. Terms used herein which are defined in the Agreement shall have the same meanings as therein defined.

B. The Bank is about to make a loan to the Company in the principal amount of \$1,750,000 (the "\$1,750,000 Loan") to be evidenced by a Note of even date herewith (the "\$1,750,000 Note").

C. The Bank has indicated that it will not make the Loan without this Amendment.

D. The Company wishes to amend the Agreement to extend the security interest granted therein to include the obligations of the Company to the Bank under the \$1,750,000 Loan and the \$1,750,000 Note.

NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree that the Agreement is amended as follows:

1. The definition of the term "Obligations" contained in the last Whereas clause of the Agreement is hereby amended to include all obligations of the Company now or hereafter arising under the \$1,750,000 Loan and the \$1,750,000 Note and the assignment and grant of security interest in the Collateral, as provided for in the Agreement, is in all respects extended to include all such Obligations.

2. Paragraph 7(a) of the Agreement is hereby amended in its entirety to read as follows:

(a) The occurrence of a default under the Guarantees or under the \$1,750,000 Note.

3. Except as amended hereby, the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the Company and the Bank have caused this Amendment to be executed as of the day and year first written above.

HOLYWELL CORPORATION

By: /s/ THEODORE B. GOULD
Theodore B. Gould, President

THE BANK OF NEW YORK

By: /s/ SPIRO G. KAILAS
SPIRO G. KAILAS
Assistant Vice President

EXHIBIT "D"

ASSIGNMENT AND SECURITY AGREEMENT

THIS ASSIGNMENT, made this 14th day of October, 1983 by THEODORE B. GOULD, residing at _____ ("Gould") to THE BANK OF NEW YORK, a New York banking corporation having its principal offices at 48 Wall Street, New York, New York 10015 (the "Bank") (the "Agreement").

A. Gould is the owner of 100% of the issued and outstanding stock of Holywell Corporation, a Delaware corporation ("Holywell").

B. The Bank is about to make a loan in the principal amount of \$1,750,000 to Holywell (the "Holywell Loan") to be evidenced by a Note, dated the date hereof, of Holywell in said principal amount (the "Holywell Note").

C. Pursuant to a Guarantee of Payment, dated the date hereof, Gould will guarantee all obligations of Holywell under the Holywell Note (the "Holywell Guarantee").

D. Gould is a guarantor of all loans made and to be made by the Bank to Miami Center Limited Partnership, a Florida limited partnership ("MCLP"), and Chopin Associates, a Florida partnership ("Chopin"), to finance the acquisition of certain land located on a portion of Tract D, Block 1, Dupont Plaza, Miami, Florida and to finance the construction of certain improvements thereon and related costs, said guarantees evidenced by various Guarantees of Payment (the "Construction Guarantees" and all obligations guaranteed thereby being the "Construction Obligations").

E. Pursuant to a certain Hypothecation and Security Agreement, dated May 14, 1981, by and among Gould, MCLP and the Bank, as amended (the "Hypothecation and Security Agreement"), Gould, among other things, hypothecated to MCLP all of his right, title and interest in and to 80,000 shares of the stock of Holywell, representing 80% of the issued

and outstanding shares of stock of Holywell (the "Hypothecated Stock") to enable MCLP to grant a security interest therein to the Bank.

F. The Bank has indicated that it will not make the Holywell Loan without this Agreement; and

G. As security for the payment and performance of all of the obligations of Gould now or hereafter arising under the Holywell Guarantee and the Construction Guarantees (collectively, the "Obligations"), Gould wishes to assign to the Bank a continuing first priority security interest in the Collateral (as hereinafter defined).

NOW, THEREFORE, in consideration of the premises, the mutual covenants, terms and conditions herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Gould hereby covenants and agrees as follows:

1. *Definitions:* Unless the context hereof otherwise requires, the following terms shall have the following meanings, such definitions to be applicable equally to the singular and plural forms:

"Lien" shall mean any lien, mortgage, pledge, assignment, security interest, charge or other encumbrance of any kind, or the interest of a vendor or lessor under any conditional sale agreement, capital lease or other title retention agreement.

"Person" shall mean any individual, corporation, partnership, trust, governmental body, joint venture or other entity, whether acting in a fiduciary capacity or otherwise.

"Property" shall mean all personal, real or mixed property, tangible or intangible.

2. *Assignment and Grant of Security Interest:* As collateral security for the payment and performance of the Obligations, Gould hereby pledges, assigns and grants to the

Bank a continuing first security interest in and to the following:

(a) all Collateral under and as defined in the Hypothecation and Security Agreement (the "Hypothecated Collateral").

(b) all right, title and interest of Gould in and to 20,000 shares of the capital stock of Holywell, represented by certificate no. 21 (the "Stock Collateral") constituting, together with the Hypothecated Stock, all of the issued and outstanding capital stock of Holywell.

The Stock Collateral and the Hypothecated Collateral, together with all substitutions, additions and replacements thereto and therefor and all proceeds thereof being hereinafter collectively referred to as the "Collateral".

3. *Covenants and Agreements of Gould:* Gould covenants and agrees that so long as any of the Obligations hereby secured remain unpaid or undischarged that:

(a) The assignment and grant of security interest in the Stock Collateral to the Bank will be clearly marked on the books of Gould and Holywell as assigned to the Bank.

(b) Gould will not hypothecate or further pledge, assign, or otherwise create or suffer to exist a Lien on the Collateral in favor of anyone other than the Bank as provided herein and under the Hypothecation and Security Agreement, and will promptly deliver or cause to be delivered to the Bank the Collateral upon his receipt or right to receive same.

(c) Gould authorizes and empowers the Bank to require Gould to notify, or itself to notify, either in its own name or in the name of Gould, any Person to whom the Bank deems notice is necessary, of the fact of the assignment and grant of security interest provided herein.

(d) Gould authorizes and empowers the Bank to ask for, demand, collect, institute and maintain suits for, receive, compound, compromise and give acquittance for any and all sums which are now or may hereafter constitute Collateral, to enforce payment thereof either in its own name or in the name of Gould and to make such endorsements in its own name or in the name of Gould as it shall deem necessary with respect thereto, and to collect any instruments tendered or received by it in connection therewith.

(e) Gould agrees that under no circumstances shall the Bank be under any duty whatsoever to take any steps necessary to preserve rights against prior or third parties, and the Bank's rights against Gould and with respect to the Collateral shall continue unimpaired notwithstanding. The Bank shall not be responsible to Gould for any loss or damage resulting from the Bank's failure to collect monies or other Property constituting Collateral, or resulting from other action herein authorized and taken or not taken by the Bank. The Bank shall have no duty to act with respect to any of the foregoing.

(f) Gould authorizes the Bank at the Company's expense to file one or more financing statements and continuation statements to perfect and continue the perfection of the assignment and security interest herein provided, and Gould agrees to pay all costs of file, title or other searches made by the Bank with respect to Gould.

(g) In the event that all or any part of the shares constituting the Stock Collateral or the Hypothecated Stock are lost, destroyed or wrongfully taken while such shares are in the possession of the Bank, Gould agrees that it will cause to be issued new shares in place of the lost, destroyed or wrongfully taken shares upon request therefor by the Bank and without the necessity of any indemnity bond or other security other than the Bank's agreement of indemnity therefor.

(h) Gould will not permit there to be issued any additional shares of Holywell or redeem, seek to redeem or permit there to be redeemed any part of the shares of Holywell.

(i) Gould will deliver upon demand to the Bank copies of any documents, correspondence or records relating to the Collateral.

(j) Gould will not (i) sell or otherwise dispose of, or grant an option with respect to, the Collateral or (ii) create or permit to exist any Lien upon or with respect to the Collateral, except for the assignment and security interest provided herein and in the Hypothecation and Security Agreement.

(k) Gould will at any time and from time to time promptly do, perform, file, record, make, execute, acknowledge and deliver all such acts, deeds, things, notices, instruments and financing statements as may be necessary or desirable or as the Bank may require in order more completely to vest in and assure to the Bank its assignment and security interest in the Collateral and the enforcement of and giving effect to its rights, remedies and powers hereunder.

(l) Gould will not enter into any new agreement or arrangement with any Person which in any manner would adversely affect the Collateral or the interest of the Bank therein.

(m) With respect to the Collateral, the Bank shall be under no duty to send notices, perform services, exercise any rights of collection, enforcement, or conversion, or exchange, vote, pay for insurance, taxes or other charges or take any action of any kind in connection with the management thereof and its only duty with respect thereto shall be to use reasonable care while the Collateral is in its actual possession, which shall not include any steps necessary to preserve rights against prior or third parties.

(n) Gould will give prompt written notice to the Bank if: (i) any obligation of Gould for borrowed money, or if any other indebtedness of Gould is declared or shall become due and payable prior to its stated maturity, or called and not paid when due, (ii) the holder of any note or other evidence of indebtedness, certificate or security evidencing any such obligation, or any obligee with respect to any other indebtedness of Gould, has the right to declare such obligation due and payable prior to its stated maturity, or (iii) there shall occur and be continuing an Event of Default hereunder.

4. *Representations and Warranties of Gould.* Gould represents and warrants and, so long as any of the Obligations hereby secured remains unpaid or undischarged, shall be deemed continuously to represent and warrant that:

(a) Gould has full power and authority to enter into, execute, deliver and carry out the terms of this Agreement. No consent or approval of any person is required to authorize, or is required in connection with the execution, delivery and performance of, this Agreement, or is required as a condition to the validity or enforceability of this Agreement.

(b) This Agreement constitutes the valid and legally binding obligations of Gould enforceable in accordance with its terms.

(c) No provision of any existing mortgage, indenture, contract, agreement, statute (including, without limitation, any applicable usury or similar law), rule, regulation, judgment, decree or order binding on Gould or affecting the Property of Gould conflicts with, or requires any consent under, or would in any way prevent or restrict the execution, delivery or carrying out of the terms of, this Agreement and the taking of any such action will not constitute a default under, or result in the creation or imposition of, or obligation to create, any Lien upon the Property of Gould pursuant to the terms of any such mortgage, indenture, contract or agreement.

(d) No representation or warranty contained herein and no certificate or report furnished or to be furnished by Gould in connection with the transactions contemplated hereby, contains or will contain a misstatement of material fact, or omits or will omit to state a material fact required to be stated in order to make the statements herein or therein contained not misleading in the light of the circumstances under which made.

(e) No part of the Collateral is subject to dispute, objection, setoff, counterclaim or complaint by any Person.

(f) Gould is the present and sole owner of the Collateral free of any Lien except for the assignment and security interest provided herein and in the Hypothecation and Security Agreement.

(g) No applicable law or governmental regulation and nothing in any agreement between Gould and any other Person purports to forbid, restrict or subject to conditions precedent the granting of an assignment of or a security interest in any of the Collateral.

(h) The assignment of and grant of a security interest in the Collateral pursuant to this Agreement creates a valid and perfected present and first priority assignment and security interest in the Collateral subject to no other Lien except as provided in the Hypothecation and Security Agreement.

(i) No authorization, approval, or other action by, and no notice to or filing with, any governmental authority or regulatory body is required (i) for the assignment by Gould of the Collateral pursuant to this Agreement, (ii) for the execution, delivery or performance of this Agreement by Gould or (iii) for the exercise by the Bank of the rights provided for in this Agreement or the remedies in respect of the Collateral pursuant to this Agreement.

(j) There are no actions, suits, arbitration proceedings or investigations (whether or not purportedly on behalf of Gould pending or, to the knowledge of Gould, threatened against Gould or maintained by Gould at law or in equity before any governmental body which might result in a material adverse change in the financial condition or Property of Gould.

(k) Gould has filed or caused to be filed all tax returns required to be filed, and has paid, or has made adequate provision for the payment of, all taxes shown to be due and payable on said returns or in any assessments made against him, and no tax Liens have been filed and no claims are being asserted with respect to such taxes except as disclosed.

5. *Custody and Preservation.* The Bank shall be deemed to have exercised reasonable care in the custody and preservation of the Collateral in its possession if the Collateral is accorded treatment substantially equal to that which the Bank accords its own Property, it being understood that the Bank shall not have any responsibility for taking any steps to preserve rights against any prior or third parties with respect to any of the Collateral.

6. *Performance by Bank.* If Gould shall default in the performance of any of the provisions hereof on Gould's part to be performed, the Bank may (but is not obligated to) perform same for Gould's account and any monies expended in so doing shall be chargeable with interest at a rate per annum equal to 3 percent over the prime rate of The Bank of New York as announced to be in effect from time to time, but in no event shall such interest rate exceed the maximum rate permitted by law. All such monies and interest shall be payable on demand and be secured by the Collateral. The foregoing shall not limit Gould's obligations or the Bank's rights under this Agreement.

7. *Events of Default:* The following shall each constitute an "Event of Default" hereunder:

(a) The occurrence of a default under the Holywell Guarantee or any of the Construction Guarantees; or

(b) The occurrence of a default under the Holywell Note which is not remedied under the Holywell Guarantee; or

(c) If Gould shall fail to perform or observe any covenant or agreement on its part to be performed or observed under this Agreement; or

(d) If any representation or warranty of Gould contained herein or in any certificate, report, opinion or notice delivered or to be delivered by Gould pursuant hereto shall prove to have been incorrect or misleading in any material respect when made; or

(e) The occurrence of a default by Chopin or MCLP under any note or mortgage held by the Bank; or

(f) If Theodore B. Gould shall die or be declared an incompetent; or

(g) the occurrence of an Event of Default under and as defined in the Hypothecation and Security Agreement.

8. *Remedies on Default:* Upon the occurrence of an Event of Default, the Bank may proceed to enforce its rights hereunder by suit in equity, action at law and/or other appropriate proceedings, whether for payment or the specific performance of any covenant or agreement contained in this Agreement. In addition to all of the rights and remedies provided for in this Agreement and all of the rights and remedies allowed by law, the Bank shall have the rights and remedies of a secured party under the Uniform Commercial Code as in effect at that time and, without limiting the generality of the foregoing, the Bank may immediately, without demand or performance and without notice of intention to sell or of the time or place of sale or of redemption or other notice or demand whatsoever to Gould, all of which are hereby expressly waived, and without advertisement, sell at any time or from time to time, at public or private sale,

grant options to purchase or otherwise realize upon, in the States of New York or elsewhere, the whole or any part of the Collateral. At any such sale or other disposition, the Bank, its assigns, officers or nominees, may purchase the whole or any part of the Collateral free from any right of redemption on the part of Gould, which right is hereby waived and released. In the event of a sale or other disposition of any of the Collateral, the Bank may apply the proceeds thereof to the satisfaction of the Bank's reasonable attorneys' fees, legal expenses, and other costs and expenses incurred in connection with the selling of any of the Collateral. Without precluding any other methods of sale, the sale of any of the Collateral shall be deemed to have been made in a commercially reasonable manner if conducted in conformity with reasonable commercial practices of banks disposing of similar property sold as collateral. To the extent permitted under applicable law, full power and authority are hereby given to the Bank to sell, assign, and deliver the whole of the Collateral or any part thereof, at any time and from time to time, at any broker's board or at any sale, at the Bank's option, and no delay on the Bank's part in exercising any power of sale or any other rights or options hereunder, and no notice or demand which may be given to or made upon Gould by the Bank with respect to any power of sale or other right or option hereunder shall constitute a waiver thereof, or limit or impair the Bank's right to take any action or to exercise any power of sale or any other rights hereunder without notice or demand, or prejudice the Bank's rights as against Gould in any respect.

Upon the occurrence of an Event of Default, any or all shares of the Stock Collateral and the Hypothecated Stock may, upon compliance with any applicable provisions of law, be registered in the name of the Bank or its nominee, as the Bank shall, in its sole discretion, decide. Thereafter, the Bank or such nominee may, without notice, exercise all voting and other shareholder rights at any meeting thereof, and exercise any and all rights of conversion, exchange, subscription or

any other rights, privileges or options pertaining to any shares of the Stock Collateral or the Hypothecated Stock as if the Bank or such nominee were the absolute owner thereof, including, without limitation, the right to exchange, at the Bank's or such nominee's discretion, any and all of the Stock Collateral or the Hypothecated Stock upon the merger, consolidation, reorganization, recapitalization or other readjustment of or involving Holywell or upon the exercise by Gould or the Bank of any right, privilege or option pertaining to any shares of the Stock Collateral or the Hypothecated Stock. In connection therewith, the Bank or such nominee may deposit and deliver any and all of the Stock Collateral or the Hypothecated Stock with any committee, depository, transfer agent, registrar or other designated agent upon such terms and conditions as the Bank or its nominee may determine, all without liability, except to account for property actually received by it. The Bank or its nominee shall have no duty to exercise any of the aforesaid rights, privileges or options, and shall not be responsible for any failure to do so or delay in so doing.

Gould hereby expressly waives any presentment, demand, protest, notice of protest or other notice of any kind. Gould hereby further expressly waives and covenants not to assert any appraisalment, valuation, stay, extension, redemption or similar laws, now or at any time hereafter in force which might delay, prevent or otherwise impede the performance or enforcement of this Agreement.

Except as otherwise specifically provided by the provisions hereof, the Bank may, at any time and from time to time, waive in whole or in part, absolutely or conditionally, any Event of Default which shall have occurred hereunder. Any such waiver shall be for such period and subject to such conditions or limitations as shall be specified in any such notice. In the case of any such waiver, the rights of the Bank under this Agreement shall be otherwise unaffected, and any Event of Default so waived shall be deemed to be cured and

not continuing to the extent and on the conditions or limitations set forth in such waiver, but no such waiver shall extend to any subsequent or other Event of Default, or impair any right, remedy or power consequent thereupon.

9. *Sale of Collateral:* Gould recognizes that the Bank may be unable or may not desire to effect a public sale of all or part of the Stock Collateral or the Hypothecated Stock by reason of certain prohibitions and restrictions contained in the Securities Act of 1933, as amended, and may be compelled or deem it desirable to resort to one or more private sales to a restricted group of purchasers who will be obligated to agree, among other things, to acquire same for their own account, for investment, and not with a view to the distribution or resale thereof. Gould agrees that private sales so made may be at prices and on terms less favorable to the seller than if the Stock Collateral or the Hypothecated Stock were sold at public sales and that the Bank has no obligation to delay sale of any of the Stock Collateral or the Hypothecated Stock for the period of time necessary to permit the issuer or maker of the Stock Collateral or the Hypothecated Stock, even if such issuer or maker would agree, to register same for public sale under the Securities Act of 1933, as amended. Gould agrees that private sales made under the foregoing circumstances shall be deemed to have been made in a commercially reasonable manner and for a commercially reasonable price.

10. *Voting and Other Rights.* Unless and until an Event of Default shall occur hereunder, the registered owners of the Stock Collateral and the Hypothecated Stock shall be entitled to vote same and to give consents, waivers and ratifications in respect thereof, provided, however, that Gould shall not take any action which would be inconsistent with, or violate any provision of, this Agreement.

11. *Notices; Manner of Delivery.* Except as otherwise specifically provided herein, all notices, requests, consents, demands, waivers and other communications hereunder shall

be in writing and shall be mailed by first-class mail or delivered in person, and all statements, reports, documents, certificates and papers to be delivered hereunder shall be mailed by first-class mail or delivered in person, in each case to the respective parties as follows:

Gould:

c/o Holywell Corporation
1300 North 17th Street
Arlington, Virginia 22209
Attention: Theodore B. Gould

the Bank:

The Bank of New York
48 Wall Street
New York, New York 10015
Attention: Douglas W. Duval,
Vice President

with a copy to:

Emmet, Marvin & Martin
48 Wall Street
New York, New York 10005
Attention: Leonard C. Pojednic, Esq.

or to such other Person or address as a party hereto shall designate to the other parties hereto from time to time in writing forwarded in like manner. Any notice, request, consent, demand, waiver or communication given in accordance with the provisions of this paragraph shall be conclusively deemed to have been received by a party hereto and to be effective on the day on which delivered to such party at its address specified above or, if sent by first class mail, on the third Business Day after the day when deposited in the mail, postage prepaid, and addressed to such party at such address, provided that a notice of change of address shall be deemed to be effective when actually received.

12. *Other Provisions:*

(a) *No Waiver of Rights by the Bank.* No failure on the part of the Bank to exercise, and no delay in exercising, any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise by the Bank of any right, remedy or power hereunder preclude any other or future exercise thereof, or the exercise of any other right, remedy or power. The rights, remedies and powers provided herein are cumulative and not exclusive of any other rights, remedies or powers which the Bank may otherwise have. Notice to or demand on Gould in any circumstance in which the terms of this Agreement do not require notice or demand to be given shall not entitle Gould to any other or further notice or demand in similar or other circumstances or constitute a waiver of the rights of the Bank to take any other or further action in any circumstances without notice or demand.

(b) *Headings, Plurals.* Paragraph and subparagraph headings have been inserted herein for convenience only and shall not be construed to be a part of this Agreement. Unless the context otherwise requires, words in the singular number include the plural, and words in the plural include the singular.

(c) *Counterparts.* This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute one agreement. It shall not be necessary in making proof of this Agreement or of any document required to be executed and delivered in connection herewith to produce or account for more than one counterpart.

(d) *Severability.* Every provision of this Agreement is intended to be severable, and if any term or provision hereof shall be invalid, illegal or unenforceable for any reason, the validity, legality and enforceability of the remaining provisions hereof shall not be affected or impaired thereby,

and any invalidity, illegality or unenforceability in any jurisdiction shall not affect the validity, legality or enforceability of any such term or provision in any other jurisdiction.

(e) *Successors and Assigns; Survival of Representations and Warranties.* This Agreement shall be binding upon and inure to the benefit of the Bank and Gould and their respective successors and assigns. All covenants, agreements, warranties and representations made herein and in all certificates or other documents delivered in connection with this Agreement by or on behalf of Gould shall survive the execution and delivery hereof and thereof, and all such covenants, agreements, representations and warranties shall inure to the respective successors and assigns of the Bank whether or not so expressed.

(f) *Applicable Law.* This Agreement is being delivered in and is intended to be performed in the State of New York and shall be construed and enforceable in accordance with, and be governed by, the internal laws of the State of New York without regard to principles of conflict of laws.

(g) *Amendment and Waivers.* This Agreement may not be amended or modified nor may any term or provision of this Agreement be waived or any consent be given hereunder except pursuant to a written instrument signed by the party or parties against whom enforcement of such amendment, modification, waiver or consent is sought.

(h) *Expenses of Bank.* Gould agrees to pay on demand all fees (including, without limitation, all lawyers' and accountants' fees, travel expenses, and other expenses of the Bank) incurred by the Bank in connection with the preparation, execution, administration and enforcement of this Agreement, the Holywell Guarantee, the Holywell Note and all documents executed and delivered in connection herewith and therewith whether or not suit is instituted.

(i) *No Modification.* This Assignment and Security Agreement shall in no way modify, diminish, amend or abrogate the obligations of Gould and MCLP under and pursuant to the Hypothecation and Security Agreement which shall remain in full force and effect notwithstanding the execution and delivery of this Agreement by Gould.

(j) *MCLP Consent.* To the extent such consent is necessary MCLP, by executing this Agreement, consents to Gould granting to the Bank a first security interest in and to the Collateral.

IN WITNESS WHEREOF, MCLP, Gould and the Bank have caused this Assignment and Security Agreement to be duly executed as of the date first above written.

/s/ THEODORE B. GOULD

Theodore B. Gould

THE BANK OF NEW YORK

By: _____

Vice President

Consented and Agreed:
Miami Center Limited
Partnership

By: /s/ THEODORE B. GOULD

Theodore B. Gould,
general partner

By: Miami Center Corporation,
general partner,

By: /s/ THEODORE B. GOULD

Theodore B. Gould,
President

APPENDIX D

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

Chapter 11

Case Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

In Re:

HOLYWELL CORPORATION, et al.,

Debtors.

**RESPONSE TO EMERGENCY MOTION FOR
CLARIFICATION AND MOTION FOR ORDER
DIRECTED TO THEODORE B. GOULD
TO SHOW CAUSE WHY HE SHOULD NOT BE
CITED FOR CIVIL CONTEMPT**

FRED STANTON SMITH, Liquidating Trustee of the Miami Center Liquidating Trust, by and through his undersigned counsel, files this Response to the Emergency Motion for Clarification filed by the Debtor Theodore B. Gould, and further moves this Court for the entry of an order to show cause directed to the Debtor Theodore B. Gould, as to why he should not be cited to the United States District Court for the Southern District of Florida for contempt for willfully and knowingly interfering with the Liquidating Trustee's administration of the instant Debtor estates, where said intentional conduct was an attempt to embarrass this Court, impugn its integrity and thwart the Liquidating Trustee from carrying out his court-appointed duties in connection with making distribution under the confirmed Amended Consolidated Plan of Reorganization, as Amended (confirmed Plan), and in support thereof does show:

1. That the Emergency Motion for Clarification (the Motion) is not filed in good faith and is an attempt to alleviate the contemptuous conduct expressed by the Debtor Theodore B. Gould, as will hereinafter be set forth.

2. At all times during these proceedings the proceeds of the sale of the Washington Properties, sold on or about January 1, 1985, were assets of the substantively consolidated Debtor estates and were regarded as such by the Debtor Theodore B. Gould.

3. The allegations contained in paragraphs 3, 4 and 5 of the Motion are denied.

4. By way of further answer, it will be shown unto this Court that all of the assets of Twin Development Corporation were pledged and assigned to The Bank of New York, as reflected in the Assignment and Security Agreement annexed hereto and made a part hereof as Exhibit 1.

5. In accordance with the Court's Order of December 11, 1984 (Court Paper 257), a copy of which is annexed hereto and made a part hereof as Exhibit 2, the proceeds of the sale of the Washington Properties, including that portion inuring to Twin Development Corporation, were deposited in a segregated fund, subject to order of this Court.

6. On December 31, 1984 this Court entered its Order (Court Paper 303), a copy of which is annexed hereto and made a part hereof as Exhibit 3, amending the December 11, 1984 Order, but restating that the proceeds of sale of the Washington Properties constituted cash collateral upon which The Bank of New York held a first lien.

7. On August 8, 1985 this Court entered its Confirmation Order (Court Paper 906) of the said Amended Consolidated Plan (Court Paper 478), as modified by the Second Amendment thereto (Court Paper 854).

8. The confirmed Plan contains the following definition of Affiliated Creditors (page 1):

Affiliated Creditors: Any "affiliate" of any of the Debtors as "affiliate" is defined in Code §101(2), including but not limited to, any of the Debtors, any corporations that are wholly or partially owned, either directly or indirectly, by all or any of the Debtors, and any entities in which any or all of the Debtors own an equity interest, including, but not limited to, Twin Development Corporation,

9. In addition thereto, the confirmed Plan identified the Gould Entities (page 7):

Gould Entities: Any of the entities comprising the defined term "Affiliated Creditors", which are directly or indirectly 100% owned by Gould, including but not limited to, Twin Development Corporation

10. The confirmed Plan further defined Washington Proceeds (Page 12):

Washington Proceeds: The sum of approximately \$32,422,798.87, which was received by Gould and certain Gould Entities from the sale of the Washington Properties and which is being held, subject to Court order, in accounts established at Florida National Bank.

11. The confirmed Plan further provided for Substantive Consolidation (page 13):

Provision for Substantive Consolidation

The Chapter 11 cases filed by the Debtors as Case Nos. 84-01590, 84-01591, 84-01592, 84-01593, and 84-01594 shall on the Effective Date be substantively consolidated pursuant to this Plan and the property of the estates of the Debtors shall be treated as common assets and the Claims of their Creditors deemed Claims against the common assets. As a result of the substantive consolidation

of the Debtors, all Claims between and among the Debtors are eliminated by this Plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and MCLP, all claims, if any, relating to or arising out of the Gould FF&E Leases, and all claims of reimbursement, subrogation, and contribution between and among all Debtors.

12. The said confirmed Plan created and settled a Trust and provided therefor in the following language (page 20):

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of §541(a), of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

It will be noted that the Washington Proceeds were a portion of the assets which became part of the corpus of the Trust.

13. Among the powers and authority of the Trustee enumerated in the confirmed Plan (paragraph 3, page 23):

(s) Invest funds of the Trust in demand and time deposits in any national bank which is an authorized depository for bankruptcy funds in the federal district in which the Trustee resides or to make temporary investments such as short-term certificates of deposit in such bank or treasury bills;

(w) Deal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any person owning the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter.

14. On November 22, 1985 your Movant filed his First Report in Conjunction with Substantial Consummation and obtained the entry of an Order approving the same on November 26, 1985, copies of which are annexed hereto and made a part hereof as Composite Exhibit 4. In said Report it was clearly indicated that the United States Treasury Bills held in the name of Twin Development Corporation were assets of this Trust and were to be liquidated on an as needed basis. No objection was filed to said Report and no appeal was taken from the Order approving said Report.

15. During the administration of this estate the said Debtor Theodore B. Gould on more than one occasion indicated that the Washington Proceeds inuring to Twin Development Corporation were in fact assets of this estate.

16. Under §1141 of the Bankruptcy Code the Trust is vested with all of the assets settled in the Trust, including but not limited to the Washington Proceeds.

17. All of the assets of Holywell Corporation, including but not limited to all of the outstanding stock of Twin Development Corporation, are a portion of the settled Trust and controlled by your Movant as Liquidating Trustee. Annexed hereto and made a part hereof as Exhibit 5 is a copy of the said stock certificate in the hands of the Liquidation Trustee.

18. Since all of the outstanding stock in Twin Development Corporation inures to the Liquidating Trustee, the assets of Twin Development Corporation, i.e., the proceeds of sale of the Washington Properties, are the property of the Trust and under the exclusive control of your Movant, which would enable him to take such action as is necessary to vote

the said stock, elect officers of Twin Development Corporation, to liquidate assets, convert the United States Treasury Bills involved to cash, and utilize said cash to pay any and all creditors of the substantively consolidated estates and for such other purposes as this Court orders.

19. It will be further shown that during September 1985, after the entry of this Court's Confirmation Order (Court Paper 906), Theodore B. Gould, without authority and in contravention of the Court's Orders of December 11 and December 31, 1984, did cause the portion of the Washington Proceeds designated as Twin Development Corporation's participation in said proceeds to be transferred from daily repos to six month United States Treasury Bills. That said transfer was in contravention of the requirements of the Code and the Orders of this Court.

20. That during the administration of this estate, your Movant as Liquidating Trustee has been ascertaining indebtednesses of the substantively consolidated estates and has been paying and discharging the same. That as of this date he has paid or is in the process of paying approximately \$15 Million in claims.

21. That there are appellate proceedings before the United States District Court for the Southern District of Florida in which an order has been entered, requesting that the United States Court of Appeals for the Eleventh Circuit accept an interlocutory appeal under 28 U.S.C. §1292(b). The major issue in said interlocutory appeal is whether or not all appeals commenced by the Debtors should be dismissed for mootness because of the substantial consummation of the confirmed Plan achieved by the Liquidating Trustee, your Movant herein.

22. In order for the Liquidating Trustee to maximize interest rates on all deposits, he decided not to encash the two United States Treasury Bills in the name of Twin Development Corporation, but reached an accord with his

depository, Florida National Bank, that as sums were needed to honor checks which were issued in payment of claims under the confirmed Plan, the Bank would encash the said Treasury Bills on an as needed basis.

23. On January 21, 1986 the Liquidating Trustee had two Treasury Bills in Account No. 00020842207 at Florida National Bank of Miami, one such bill maturing March 13, 1986, par value \$2,200,000, the other maturing on March 27, 1986, par value \$11,749,000. Both of these Treasury Bills are six months bills and, therefore, it is apparent that they were obtained by Theodore B. Gould after this Court's Order of Confirmation was entered.

24. On January 21, 1986 Theodore B. Gould forwarded two letters, one to the Liquidating Trustee, a copy of which is annexed hereto and made a part hereof as Exhibit 6, and one to John Benbow, President of Florida National Bank, a copy of which is annexed hereto and made a part hereof as Exhibit 7.

25. On January 21, 1986 the Movant's cash account at Florida National Bank was approximately \$60,000. On or about said date the Liquidating Trustee, in accordance with this Court's Order authorizing the settlement with Trusthouse Forte, was in need of a transfer of funds from the encashment of a Treasury Bill in the amount of \$988,000. In addition, on said date there had been presented for payment against the Liquidating Trustee's account dividend checks drawn by the Liquidating Trustee in the approximate amount of \$385,000.

26. Upon receipt of the January 21, 1986 correspondence, Florida National Bank advised your Movant that it would not honor the checks drawn on your Movant's account for \$385,000, nor would it honor his request for a wire transfer to Trusthouse Forte of \$988,000.

27. Upon said information being received by the Liquidating Trustee, he advised Florida National Bank

through his counsel and personally that Mr. Gould had no authority or control over the Twin Development Corporation Treasury Bills, and that Florida National Bank had full notice of the exclusive jurisdiction over said Treasury Bills by your Movant. Nevertheless, though at one time it promised to honor the wire transfer and the checks drawn on said account, Florida National Bank did not do so.

28. At the present time your Liquidating Trustee is advised that the \$988,000 wire transfer has not been made and that Florida National Bank has taken some action in connection with the checks totaling \$385,000 other than dishonoring them.

29. That none of the foregoing embarrassment, delay or harassment would have occurred had not Theodore B. Gould, without authority and in contravention of this Court's orders, sent the January 21, 1986 correspondence.

WHEREFORE, it is prayed that this Court will:

A. Enter its Order that the Liquidating Trustee has exclusive control and use of the said United States Treasury Bills listed in the name of Twin Development Corporation, since said Treasury Bills should never have been purchased by Theodore B. Gould in the name of Twin Development Corporation.

B. Issue its order to show cause addressed to Theodore B. Gould, returnable on a date certain, as to why he should not be cited to the United States District Court for the Southern District of Florida for his contemptuous conduct.

C. Grant such other and further relief as is deemed meet and proper.

I HEREBY CERTIFY that copies of the foregoing were this 24th day of January, 1986 sent by Zap Mail to Fred H. Kent, Jr., Kent, Watts & Durden, 850 Edward Ball Building, Jacksonville, Florida 32201, Raymond Bergan, Williams & Connolly, 839 Seventeenth Street, N.W., Washington, D.C.

20006, and Thomas F. Noone, Emmet, Marvin & Martin, 48 Wall Street, New York, New York 10005; and hand delivered to Vance E. Salter, Steel, Hector & Davis, 4000 Southeast Financial Center, Miami, Florida 33131, and S. Harvey Ziegler, Therrel Baisden & Meyer Weiss, 1111 Lincoln Road, Miami Beach, Florida 33139.

HOLLAND & KNIGHT
Attorneys for Liquidating Trustee
1200 Brickell Avenue
Post Office Box 015441
Miami, Florida 33101
(305) 374-8600

By /s/ Irving M. Wolff
IRVING M. WOLFF

EXHIBIT 1

ASSIGNMENT AND SECURITY AGREEMENT

THIS ASSIGNMENT, made this 23rd day of June, 1983 by HOLYWELL CORPORATION, a Delaware corporation having its principal offices at 1300 North 17th Street, Arlington, Virginia 22209 (the "Company") to THE BANK OF NEW YORK, a New York banking corporation having its principal offices at 48 Wall Street, New York, New York 10015 (the "Bank") (the "Agreement").

WHEREAS, pursuant to a certain Building Loan Agreement, dated as of March 27, 1980, as amended, by and between Miami Center Limited Partnership ("MCLP") and Charter Mortgage Company ("Charter") (the "BLA"), which BLA was assigned by Charter to the Bank, and pursuant to a certain Land Loan Agreement, dated as of March 27, 1980, as amended, by and between Chopin Associates ("Chopin") and Charter (the "LLA"), which LLA was assigned by Charter to the Bank, the Bank has made mortgage loans in the aggregate principal sum of \$173,500,000.00 to Chopin and MCLP for the purpose of funding the cost of acquisition of certain land located in Miami, Florida and the cost of construction of the improvements built or to be built (the "Improvements") on the Land and other costs in connection therewith (the "Construction Loan"); and

WHEREAS, Miami Center Corporation, a Florida corporation ("Miami Center Corp."), is a general partner of both MCLP and Chopin; and

WHEREAS, the Company is the owner of 100% of the issued and outstanding shares of capital stock of Miami Center Corp.; and

WHEREAS, pursuant to certain guarantees of payment made by the Company, Miami Center Corp. and Theodore B. Gould ("Gould") to the Bank (the "Guarantees"), the Company has guaranteed the prompt payment when due of all principal and interest due on the Construction Loan; and

WHEREAS, MCLP is unable to complete construction of the Construction Loan; and

WHEREAS, MCLP and Chopin have requested the Bank to make an additional loan to MCLP and Chopin in an amount not to exceed \$8,300,000 (the "Loan") which Loan shall be secured by, among other things, a mortgage or mortgages given by Chopin and MCLP on certain land and other property described therein, a Guarantee of Payment executed and delivered to the Bank by the Company, Gould and Miami Center Corp., and which Loan shall be evidenced by a Note or Notes given by MCLP and Chopin to the Bank (the "Note"); and

WHEREAS, the Bank has indicated that it will not make the Loan without this Agreement; and

WHEREAS, as security for the payment and performance of all of the obligations of the Company now or hereafter arising under the Guarantees of Payment of the Construction Loan and the Loan, executed and delivered by the Company to the Bank (the "Obligations") the Company wishes to assign to the Bank a continuing first priority security interest in the Collateral, as hereinafter defined.

NOW, THEREFORE, in consideration of the premises, the mutual covenants, terms and conditions herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company hereby covenants and agrees as follows:

1. *Definitions:* Unless the context hereof otherwise requires, the following terms shall have the following meanings, such definitions to be applicable equally to the singular and plural forms:

"Lien" shall mean any lien, mortgage, pledge, assignment, security interest, charge or other encumbrance of any kind, or the interest of a vendor or lessor under any conditional sale agreement, capital lease or other title retention agreement.

"Partnership Agreements" shall mean (a) the Agreement of Limited Partnership of 1300 North 17th Street Associates, as amended to date, (b) the Eleven Dupont Circle Associates Agreement of Limited Partnership, as amended to date, (c) the 1616 Reminc Limited Partnership Limited Partnership Agreement, as amended to date, (d) the Agreement of Limited Partnership of 1333 New Hampshire Associates, as amended to date, (e) the Dupont Land Associates Agreement of Limited Partnership, as amended to date.

"Person" shall mean any individual, corporation, partnership, trust, governmental body, joint venture or other entity, whether acting in a fiduciary capacity or otherwise.

"Property" shall mean all personal, real or mixed property, tangible or intangible.

"Subsidiary" shall mean any corporation, association, partnership, joint venture or other business entity of which the Company and/or any subsidiary of the Company either (a) in respect of a corporation, owns any outstanding stock or (b) in respect of an association, partnership, joint venture or other business entity, is entitled to share in any of the profits and losses, however determined.

2. Assignment and Grant of Security Interest: As collateral security for the payment and performance of the Obligations, the Company hereby pledges, assigns and grants to the Bank a continuing first security interest in and to the following:

(a) all right, title and interest of the Company in and to the following securities, all of the which shall hereinafter be referred to collectively as the "Stock Collateral"; 10 shares, constituting all of the issued and outstanding capital stock of Twin Development Corp.; 10 shares, constituting all of the issued and outstanding capital stock of HWL Corporation; 10 shares, constituting all of the issued and outstanding capital stock of Parkwell, Inc.; 10 shares, constituting all of

the issued and outstanding capital stock of Orion Industries, Inc. (d/b/a Whitehall Industries, Inc.); 10 shares, constituting all of the issued and outstanding capital stock of Holywell Construction Company (CMI, Inc.); 10 shares, constituting all of the issued and outstanding capital stock of Miami Center Corp.; 10 shares, constituting all of the issued and outstanding capital stock of Charleston Center Corp.; 10 shares, constituting all of the issued and outstanding capital stock of Pietro Bulluschi and Associates, Inc.; 66.66 shares, constituting 66⅔% of the issued and outstanding capital stock of NHA Corporation; 10 shares, constituting 50% of the issued and outstanding capital stock of Studley-Holywell Associates, Inc.;

(b) all right, title and interest of the Company (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to the Company as a general or limited partner from 1333 New Hampshire Associates, which partnership owns certain real property located at 1333 New Hampshire Avenue, N.W. Washington, D.C..

(c) all right, title and interest of the Company (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to the Company as a general or limited partner from 1300 North 17th Street Associates, which partnership owns certain real property located at 1300 North 17th Street, Arlington Virginia.

(d) all right, title and interest of the Company (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to the Company as a general or limited partner of Eleven Dupont Circle Associates, which partnership owns certain real property located at 11 Dupont Circle, Washington, D.C..

(e) all right, title and interest of the Company (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to the Company as a general or limited partner of 1616 Reminc Limited Partnership, which partnership owns certain real property located at 1616 Fort Myer Drive, Arlington, Virginia.

(f) all right, title and interest of the Company (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to the Company as a general or limited partner of Dupont Land Associates, which partnership owns certain real property located at 11 Dupont Circle, Washington, D.C.

(g) all amounts due or to become due under or as a result of any assignment or beneficial assignment or other transfer of any partnership or other interest in those partnerships set forth in subparagraph b, c, d, e and f of this Paragraph 2.

All of the interests of the Company set forth in subparagraphs a, b, c, d, e, f and g of this Paragraph 2 shall hereinafter be referred to collectively as the "Collateral".

3. *Covenants and Agreements of the Company:* The Company covenants and agrees that so long as any of the Obligations hereby secured remain unpaid or undischarged that:

(a) The assignment and grant of security interest in the Collateral to the Bank will be clearly marked on the books of the Company as assigned to the Bank.

(b) The Company will not hypothecate or further pledge, assign, or otherwise create or suffer to exist a Lien on the Collateral in favor of anyone other than the Bank as provided herein and will promptly deliver or cause to be

delivered to the Bank the Collateral upon its receipt or right to receive same.

(c) The Company authorizes and empowers the Bank to require the Company to notify, or itself to notify, either in its own name or in the name of the Company, any Person to whom the Bank deems notice is necessary, of the fact of the assignment and grant of security interest provided herein.

(d) The Company authorizes and empowers the Bank to ask for, demand, collect, institute and maintain suits for, receive, compound, compromise and give acquittance for any and all sums which are now or may hereafter constitute Collateral, to enforce payment thereof either in its own name or in the name of the Company and to make such endorsements in its own name or in the name of the Company as it shall deem necessary with respect thereto, and to collect any instruments tendered or received by it in connection therewith.

(e) The Company agrees that under no circumstances shall the Bank be under any duty whatsoever to take any steps necessary to preserve rights against prior or third parties, and the Bank's rights against the Company and with respect to the Collateral shall continue unimpaired notwithstanding. The Bank shall not be responsible to the Company or any of its Subsidiaries for any loss or damage resulting from the Bank's failure to collect monies or other Property constituting Collateral, or resulting from other action herein authorized and taken or not taken by the Bank. The Bank shall have no duty to act with respect to any of the foregoing.

(f) The Company authorizes the Bank at the Company's expense to file one or more financing statements and continuation statements to perfect and continue the perfection of the assignment and security interest herein provided, and the Company agrees to pay all costs of file, title or other searches made by the Bank with respect to the Company or any of its Subsidiaries.

(g) In the event that all or any part of the shares constituting the Stock Collateral are lost, destroyed or wrongfully taken while such shares are in the possession of the Bank, the Company agrees that it will issue or cause to be issued new shares in place of the lost, destroyed or wrongfully taken shares upon request therefor by the Bank and without the necessity of any indemnity bond or other security other than the Bank's agreement of indemnity therefor.

(h) The Company will not issue or permit there to be issued any additional shares of the Company or any of its Subsidiaries or redeem, seek to redeem or permit there to be redeemed any part of the shares of the Company or any of its Subsidiaries.

(i) The Company will not itself, or permit any other Person to, alter, modify, amend or otherwise change the Partnership Agreement, articles of incorporation or by-laws.

(j) The Company will at all reasonable times and from time to time allow the Bank to examine, inspect or make extracts from the books, ledgers, reports, correspondence and other records of the Company and its Subsidiaries.

(k) The Company will deliver upon demand to the Bank copies of any documents, correspondence or records relating to the Collateral.

(l) The Company will not (i) sell or otherwise dispose of, or grant an option with respect to, the Collateral or (ii) create or permit to exist any Lien upon or with respect to the Collateral, except for the assignment and security interest provided herein.

(m) The Company will at any time and from time to time promptly do, perform, file, record, make, execute, acknowledge and deliver all such acts, deeds, things, notices, instruments and financing statements as may be necessary or desirable or as the Bank may require in order more

completely to vest in and assure to the Bank its assignment and security interest in the Collateral and the enforcement of and giving effect to its rights, remedies and powers hereunder.

(n) The Company will not change the location of the Company's chief executive office or the place in which it keeps and maintains its books and records.

(o) A true and accurate copy of the Partnership Agreements together with all amendments thereto, and true and accurate copies of the articles of incorporation and by-laws of the entities listed in subparagraph (a) of Paragraph 2, together with all amendments thereto have been delivered to the Bank.

(p) The Company will not enter into any new agreement or arrangement with any Person which in any manner would adversely affect the Collateral or the interest of the Bank therein.

(q) With respect to the Collateral, the Bank shall be under no duty to send notices, perform services, exercise any rights of collection, enforcement, or conversion, or exchange, vote, pay for insurance, taxes or other charges or take any action of any kind in connection with the management thereof and its only duty with respect thereto shall be to use reasonable care while the Collateral is in its actual possession, which shall not include any steps necessary to preserve rights against prior or third parties.

(r) The Company will maintain, and cause each Subsidiary to maintain, its partnership or corporate existence, as the case may be, in good standing, and qualify and remain qualified to do business as a foreign corporation in each jurisdiction wherein the character of the Property owned or leased by it therein or in which the transaction of its business therein makes such qualification necessary, and cause each Subsidiary so to do.

(s) The Company will pay and discharge when due, and cause each Subsidiary so to do, all taxes, assessments and governmental charges, and levies upon or with respect to the Company and each Subsidiary.

(t) The Company will maintain, and cause each Subsidiary to maintain, insurance with financially sound insurance carriers on such of its Property, against such risks, and in such amounts as is customarily maintained by similar businesses.

(u) The Company will give prompt written notice to the Bank if: (i) any obligation of the Company or any Subsidiary for borrowed money, or if any other indebtedness of the Company or any Subsidiary, is declared or shall become due and payable prior to its stated maturity, or called and not paid when due, (ii) the holder of any note or other evidence of indebtedness, certificate or Security evidencing any such obligation, or any obligee with respect to any other indebtedness of the Company or any Subsidiary, has the right to declare such obligation due and payable prior to its stated maturity, or (iii) there shall occur and be continuing an Event of Default hereunder.

4. *Representations and Warranties of the Company.* The Company represents and warrants and, so long as any of the Obligations hereby secured remains unpaid or undischarged, shall be deemed continuously to represent and warrant that:

(a) The Company and each of its Subsidiaries is duly organized, validly existing, in good standing under the laws of the jurisdiction of its incorporation or formation, has all requisite power and authority to own its Property and to carry on its business as now conducted, and is in good standing and authorized to do business in each jurisdiction in which the character of the Property owned and leased by it therein or the transaction of its business makes such qualification necessary.

(b) The Company has full power and authority to enter into, execute, deliver and carry out the terms of this Agreement, all of which have been duly authorized by all proper and necessary corporate action. No consent or approval of, or exemption by, shareholders is required to authorize, or is required in connection with the execution, delivery and performance of, this Agreement, or is required as a condition to the validity of enforceability of this Agreement.

(c) This Agreement constitutes the valid and legally binding obligations of the Company enforceable in accordance with its terms.

(d) No provision of the certificate of incorporation, by-laws or preferred stock, if any, of the Company, and no provision of any existing mortgage, indenture, contract, agreement, statute (including, without limitation, any applicable usury or similar law), rule, regulation, judgment, decree or order binding on the Company or affecting the Property of the Company conflicts with, or requires any consent under, or would in any way prevent or restrict the execution, delivery or carrying out of the terms of, this Agreement and the taking of any such action will not constitute a default under, or result in the creation or imposition of, or obligation to create, any Lien upon the Property of the Company pursuant to the terms of any such mortgage, indenture, contract or agreement.

(e) No representation or warranty contained herein and no certificate or report furnished or to be furnished by the Company in connection with the transactions contemplated hereby, contains or will contain a misstatement of material fact, or omits or will omit to state a material fact required to be stated in order to make the statements herein or therein contained not misleading in the light of the circumstances under which made.

(f) No part of the Collateral is subject to dispute, objection, setoff, counterclaim or complaint by any Person.

(g) The Company has not heretofore assigned, granted a security interest in or otherwise encumbered any part of the Collateral or any rights or interests therein or thereto, and the Company is the present and sole owner of the Collateral free of any Lien except for the assignment and security interest provided herein, or except as disclosed and consented to by Bank in writing.

(h) No applicable law or governmental regulation and nothing in any agreement between the Company and any other Person purports to forbid, restrict or subject to conditions precedent the granting of an assignment of or a security interest in any of the Collateral.

(i) The assignment of and grant of a security interest in the Collateral pursuant to this Agreement creates a valid and perfected present and first priority assignment and security interest in the Collateral subject to no other Lien.

(j) No authorization, approval, or other action by, and no notice to or filing with, any governmental authority or regulatory body is required (i) for the assignment by the Company of the Collateral pursuant to this Agreement, (ii) for the execution, delivery or performance of this Agreement by the Company or (iii) for the exercise by the Bank of the rights provided for in this Agreement or the remedies in respect of the Collateral pursuant to this Agreement.

(k) The Company's chief executive office is located at 1300 North 17th Street, Arlington, Virginia which is where all books and records of the Company and its Consolidated Subsidiaries are (hereinafter defined) kept and maintained.

(l) The Company has only the Subsidiaries set forth in Paragraph 1 hereof. The shares of each corporate Subsidiary owned by the Company or any Subsidiary are owned free and clear of any Liens and are validly issued and fully paid for. The interest in each non-corporate Subsidiary

owned by the Company or any Subsidiary is owned free and clear of any Liens.

(m) There are no actions, suits, arbitration proceedings or investigations (whether or not purportedly on behalf of the Company or any Subsidiary) pending or, to the knowledge of the Company, threatened against the Company or any Subsidiary, or maintained by the Company or any Subsidiary, in law or in equity before any governmental body which might result in a material adverse change in the financial condition, Property or operations of the Company or any Subsidiary except as set forth in Exhibit A attached hereto.

(n) The Company and each Subsidiary has filed or caused to be filed all tax returns required to be filed, and has paid, or has made adequate provision for the payment of, all taxes shown to be due and payable on said returns or in any assessments made against it, and no tax Liens have been filed and no claims are being asserted with respect to such taxes.

5. *Custody and Preservation.* The Bank shall be deemed to have exercised reasonable care in the custody and preservation of the Collateral in its possession if the Collateral is accorded treatment substantially equal to that which the Bank accords its own Property, it being understood that the Bank shall not have any responsibility for taking any steps to preserve rights against any prior or third parties with respect to any of the Collateral.

6. *Performance by Bank.* If the Company shall default in the performance of any of the provisions hereof on the Company's part to be performed, the Bank may (but is not obligated to) perform same for the Company's account and any monies expended in so doing shall be chargeable with interest at a rate per annum equal to 3 percent over the prime rate of The Bank of New York as announced to be in effect from time to time, but in no event shall such interest rate

exceed the maximum rate permitted by law. All such monies and interest shall be payable on demand and be secured by the Collateral. The foregoing shall not limit the Company's obligations or the Bank's rights under this Agreement.

7. *Events of Default:* The following shall each constitute an "Event of Default" hereunder:

(a) The occurrence of a default under the Guarantee; or

(b) The occurrence of a default under that certain Building Loan Mortgage, Assignment of Leases and Rents and Security Agreement of even date herewith by and among Chopin, MCLP and the Bank, to be recorded in the Clerk's Office, Dade County, Florida; or

(c) If the Company shall fail to perform or observe any covenant or agreement on its part to be performed or observed under this Agreement; or

(d) If any representation or warranty of the Company contained herein or in any certificate, report, opinion or notice delivered or to be delivered by the Company pursuant hereto shall prove to have been incorrect or misleading in any material respect when made; or

(e) The occurrence of a default by Chopin or MCLP under any note or mortgage held by the Bank; or

(f) The occurrence of a default under that certain Assignment of even date herewith made by 1333 New Hampshire Associates, NHA Corporation, Eleven Dupont Circle Associates, Dupont Land Associates, Holywell and Gould to the Bank; or

(g) The occurrence of an Event of Default under and as defined in that certain Mortgage, Assignment of Leases and Rents made or to be made by Charleston Center Corporation and delivered to the Bank; or

(h) The occurrence of a default under the BLA or LLA made by MCLP and Chopin, respectively, and assigned to the Bank; or

(i) If Theodore B. Gould shall die or be declared an incompetent.

8. *Remedies on Default:* Upon the occurrence of an Event of Default, the Bank may proceed to enforce its rights hereunder by suit in equity, action at law and/or other appropriate proceedings, whether for payment or the specific performance of any covenant or agreement contained in this Agreement. In addition to all of the rights and remedies provided for in this Agreement and all of the rights and remedies allowed by law, the Bank shall have the rights and remedies of a secured party under the Uniform Commercial Code as in effect at that time and, without limiting the generality of the foregoing, the Bank may immediately, without demand of performance and without notice of intention to sell or of the time or place of sale or of redemption or other notice or demand whatsoever to the Company, all of which are hereby expressly waived, and without advertisement, sell at any time or from time to time, at public or private sale, grant options to purchase or otherwise realize upon, in the States of New York, Florida or elsewhere, the whole or any part of the Collateral. At any such sale or other disposition, the Bank, its assigns, officers or nominees, may purchase the whole or any part of the Collateral free from any right of redemption on the part of the Company, which right is hereby waived and released. In the event of a sale or other disposition of any of the Collateral, the Bank may apply the proceeds thereof to the satisfaction of the Bank's reasonable attorney's fees, legal expenses, and other costs and expenses incurred in connection with the selling of any of the Collateral. Without precluding any other methods of sale, of any of the Collateral shall be deemed to have been made in a commercially reasonable manner if conducted in conformity with reasonable commercial practices of banks

disposing of similar property sold as collateral. To the extent permitted under applicable law, full power and authority are hereby given to the Bank to sell, assign, and deliver the whole of the Collateral or any part thereof, at any time and from time to time, at any broker's board or at any sale, at the Bank's option and no delay on the Bank's part in exercising any power of sale or any other rights or options hereunder, and no notice or demand which may be given to or made upon the Company by the Bank with respect to any power of sale or other right or option hereunder shall constitute a waiver thereof, or limit or impair the Bank's right to take any action or to exercise any power of sale or any other rights hereunder without notice or demand, or prejudice the Bank's rights as against the Company in any respect.

Upon the occurrence of an Event of Default, any or all shares of the Stock Collateral may, upon compliance with any applicable provisions of law, be registered in the name of the Bank or its nominee, as the Bank shall, in its sole discretion, decide. Thereafter, the Bank or such nominee may, without notice, exercise all voting and other shareholder rights at any meeting thereof, and exercise any and all rights of conversion, exchange, subscription or any other rights, privileges or options pertaining to any shares of the Stock Collateral as if the Bank or such nominee were the absolute owner thereof, including, without limitation, the right to exchange, at the Bank's or such nominee's discretion, any and all of the Stock Collateral upon the merger, consolidation, reorganization, recapitalization or other readjustment of or involving the Company or upon the exercise by the Company or the Bank of any right, privilege or option pertaining to any shares of the Stock Collateral. In connection therewith, the Bank or such nominee may deposit and deliver any and all of the Stock Collateral with any committee, depository, transfer agent, registrar or other designated agent upon such terms and conditions as the Bank or its nominee may determine, all without liability, except to account for property actually received by it. The Bank or its nominee shall have

no duty to exercise any of the aforesaid rights, privileges or options, and shall not be responsible for any failure to do so or delay in so doing.

The Company hereby expressly waives any presentment, demand, protest, notice of protest or other notice of any kind. The Company hereby further expressly waives and covenants not to assert any appraisement, valuation, stay, extension, redemption or similar laws, now or at any time hereafter in force which might delay, prevent or otherwise impede the performance or enforcement of this Agreement.

Except as otherwise specifically provided by the provisions hereof, the Bank may, at any time and from time to time, waive in whole or in part, absolutely or conditionally, any Event of Default which shall have occurred hereunder. Any such waiver shall be for such period and subject to such conditions or limitations as shall be specified in any such notice. In the case of any such waiver, the rights of the Bank under this Agreement shall be otherwise unaffected, and any Event of Default so waived shall be deemed to be cured and not continuing to the extent and on the conditions or limitations set forth in such waiver, but no such waiver shall extend to any subsequent or other Event of Default, or impair any right, remedy or power consequent thereupon.

9. *Sale of Stock Collateral:* The Company recognizes that the Bank may be unable or may not desire to effect a public sale of all or part of the Stock Collateral by reason of certain prohibitions and restrictions contained in the Securities Act of 1933, as amended, and may be compelled or deem it desirable to resort to one or more private sales to a restricted group of purchasers who will be obligated to agree, among other things, to acquire the Stock Collateral for their own account, for investment, and not with a view to the distribution or resale thereof. The Company agrees that private sales so made may be at prices and on terms less favorable to the seller than if the Stock Collateral were sold at public sales and that the Bank has no obligation to

delay sale of any of the Stock Collateral for the period of time necessary to permit the issuer or maker of the Stock Collateral, even if such issuer or maker would agree, to register the Collateral for public sale under the Securities Act of 1933, as amended. The Company agrees that private sales made under the foregoing circumstances shall be deemed to have been made in a commercially reasonable manner and for a commercially reasonable price.

10. *Voting and Other Rights.* Unless and until an Event of Default shall occur hereunder, the registered owners of the Stock Collateral shall be entitled to vote the Stock Collateral and to give consents, waivers and ratifications in respect of the Stock Collateral, provided, however, that the Company shall not take any action which would be inconsistent with, or violate any provision of, this Agreement.

11. *Notices; Manner of Delivery.* Except as otherwise specifically provided herein, all notices, requests, consents, demands, waivers and other communications hereunder shall be in writing and shall be mailed by first-class mail or delivered in person, and all statements, reports, documents, certificates and papers to be delivered hereunder shall be mailed by first-class mail or delivered in person, in each case to the respective parties as follows:

the Company:

Holywell Corporation
1300 North 17th Street
Arlington, Virginia 22209
Attention: Theodore B. Gould,
President

the Bank:

The Bank of New York
48 Wall Street
New York, New York 10015
Attention: Douglas W. Duval,
Vice President

with a copy to:

Emmet, Marvin & Martin
48 Wall Street
New York, New York 10005
Attention: Leonard C. Pojednic, Esq.

or to such other Person or address as a party hereto shall designate to the other parties hereto from time to time in writing forwarded in like manner. Any notice, request, consent, demand, waiver or communication given in accordance with the provisions of this paragraph shall be conclusively deemed to have been received by a party hereto and to be effective on the day on which delivered to such party at its address specified above or, if sent by first class mail, on the third Business Day after the day when deposited in the mail, postage prepaid, and addressed to such party at such address, provided that a notice of change of address shall be deemed to be effective when actually received.

12. *Other Provisions:*

(a) *No Waiver of Rights by the Bank.* No failure on the part of the Bank to exercise, and no delay in exercising, any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise by the Bank of any right, remedy or power hereunder preclude any other or future exercise thereof, or the exercise of any other right, remedy or power. The rights, remedies and powers provided herein are cumulative and not exclusive of any other rights, remedies or powers which the Bank may otherwise have. Notice to or demand on the Company in any circumstance

in which the terms of this Agreement do not require notice or demand to be given shall not entitle the Company to any other or further notice or demand in similar or other circumstances or constitute a waiver of the rights of the Bank to take any other or further action in any circumstances without notice or demand.

(b) *Headings, Plurals.* Paragraph and subparagraph headings have been inserted herein for convenience only and shall not be construed to be a part of this Agreement. Unless the context otherwise requires, words in the singular number include the plural, and words in the plural include the singular.

(c) *Counterparts.* This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute one agreement. It shall not be necessary in making proof of this Agreement or of any document required to be executed and delivered in connection herewith to produce or account for more than one counterpart.

(d) *Severability.* Every provision of this Agreement is intended to be severable, and if any term or provision hereon shall be invalid, illegal or unenforceable for any reason, the validity, legality and enforceability of the remaining provisions hereof shall not be affected or impaired thereby, and any invalidity, illegality or unenforceability in any jurisdiction shall not affect the validity, legality or enforceability of any such term or provision in any other jurisdiction.

(e) *Successors and Assigns; Survival of Representations and Warranties.* This Agreement shall be binding upon and inure to the benefit of the Bank and the Company and their respective successors and assigns. All covenants, agreements, warranties and representations made herein and in all certificates or other documents delivered in connection with this Agreement by or on behalf of the Company shall survive

the execution and delivery hereof and thereof, and such all covenants, agreements, representations and warranties shall inure to the respective successors and assigns of the Bank whether or not so expressed.

(f) *Applicable Law.* This Agreement is being delivered in and is intended to be performed in the State of New York and shall be construed and enforceable in accordance with, and be governed by, the internal laws of the State of New York without regard to principles of conflict of laws.

(g) *Amendment and Waivers.* This Agreement may not be amended or modified nor may any term or provision of this Agreement be waived or any consent be given hereunder except pursuant to a written instrument signed by the party or parties against whom enforcement of such amendment, modification, waiver or consent is sought.

(h) *Expenses of Bank.* The Company agrees to pay on demand all fees (including, without limitation, all lawyers' and accountants' fees, travel expenses, and other expenses of the Bank) incurred by the Bank in connection with the preparation, execution, administration and enforcement of this Agreement and the Guarantee, whether or not suit is instituted.

IN WITNESS WHEREOF, the Company and the Bank have caused this Assignment and Security Agreement to be duly executed as of the date first above written.

HOLYWELL CORPORATION

By: /s/ Theodore B. Gould
Theodore B. Gould, President

THE BANK OF NEW YORK

By: /s/ Robert E. Walsh
Vice President

EXHIBIT A
List of Lawsuits

APPENDIX E

[FILED OCT 1, 1984]

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**Case Nos. 84-01590-BKC-TCB
through 84-01594-BKC-TCB**

Chapter 11

In re:

HOLYWELL CORPORATION, et al.,

Debtors.

**MOTION FOR ORDER APPROVING AND
AUTHORIZING HOLYWELL CORPORATION AND
THEODORE B. GOULD TO CONSUMMATE THE
SALE OF CERTAIN REAL AND PERSONAL PROPERTY**

Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), debtors and debtors-in-possession, move this Court for an order authorizing and approving the sale by Holywell and Gould of certain real and personal property owned by Holywell and Gould as partners and stockholders in Twin Development Corporation, a Virginia corporation ("Twin"), 1300 North 17th Street Associates, a Virginia limited partnership ("1300"), 1616 Reminc Limited Partnership, a Virginia limited partnership ("1616"), Eleven DuPont Circle Associates, a District of Columbia limited partnership ("Eleven") and DuPont Land Associates, a District of Columbia limited partnership ("DuPont Land"), (collectively the "Sellers"), pursuant to §363(b) of the Bankruptcy Code and as grounds therefor state:

1. On August 22, 1984 (the "Filing Date"), Holywell, Gould and the other debtors herein (collectively the "Debtors") each filed a petition for reorganization under Chapter 11, §301 of the Bankruptcy Code (the "Code") and

each has continued in the management and operation of its respective business and properties as a debtor-in-possession pursuant to §1107 and §1108 of the Code. The within Chapter 11 cases are being jointly administered pursuant to order of this Court. No trustee or examiner has been appointed.

2. The Debtors are principally engaged in the business of owning and operating office buildings, hotels and other commercial real property.

3. Gould, one of the Debtors herein, is the President of Twin and is the managing general partner of 1300, 1616, Eleven and DuPont Land. Holywell, one of the Debtors herein, owns all of the issued and outstanding shares of common stock of Twin. Gould owns all of the issued and outstanding shares of common stock of Holywell.

4. Sellers have entered into a Purchase Agreement (the "Purchase Agreement"), dated July 26, 1984, with Hadid Investment Group, Inc., a Virginia corporation, and/or assigns ("Hadid"), which was amended by First Amendment to Purchase Agreement between Sellers and Hadid dated August 28, 1984 (the "First Amendment"), whereby Hadid shall acquire all of Seller's right, title and interest in and to two office buildings located in Arlington, Virginia, and commonly referred to as the 1616 Property and the Twin Property, and one office building located in Washington, D.C. and commonly referred to as the Washington Property, for a purchase price of One Hundred Twelve Million Dollars (\$112,000,000). A copy of the Purchase Agreement and the First Amendment are annexed hereto and incorporated herein as Exhibit "A" and reference should be made thereto for the specific terms and provisions thereof. Since the inception of these Chapter 11 proceedings, Holywell and Gould have been unable to proceed with the closing of the Purchase Agreement inasmuch as their status as Debtors-in-Possession has effectively precluded the Seller's ability to close and consummate the sale transaction as contemplated by the Purchase Agreement. Additionally, the entry of an

Order of this Court authorizing Holywell and Gould, Debtors herein, to sell their right, title and interest in the real and personal property is a condition precedent to the closing of the transaction.

5. The purchase price for the subject properties, as set forth in the Purchase Agreement, is fair and equitable, and represents not less than the fair market value of such property, having been negotiated at arm's length. The Purchaser has no affiliation with any Seller entity or with any Debtor in these proceedings.

6. Consummation of the transaction proposed herein is in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale which inures to Holywell and Gould will provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings.

7. Under §363(b) of the Code, a Debtor-in-Possession, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate. Bankruptcy Rule 2002(a) (2) provides that in the event of a sale pursuant to §363(b), the Debtor-in-Possession shall give all creditors not less than Twenty (20) days notice of the hearing on such sale. The Debtors intend to comply with the notice requirements set forth in Bankruptcy Rule 2002.

WHEREFORE, movants pray for the entry of an order:

(a) Approving and authorizing Holywell and Gould to consummate the sale of the 1616 Property, the Twin Property and the Washington Property to Hadid upon the terms and conditions set forth in the Purchase Agreement and the First Amendment; and

(b) Granting such other and further relief as this Court deems just and proper.

Dated: Miami, Florida
September 28, 1984

KENT, WATTS, DURDEN, KENT,
NICHOLS & MICKLER

By: /s/ Fred H. Kent, Jr.

Fred H. Kent, Jr.
Robert C. Nichols

850 Edward Ball Building
Jacksonville, FL 32202
904/354-1600

Attorneys for Debtors

APPENDIX F
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB

In re:

HOLYWELL CORPORATION,
a Delaware corp.,

Debtor.

AMENDED DISCLOSURE STATEMENT

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I.

INTRODUCTION

Holywell Corporation, debtor in possession (hereinafter either the "Company" or "Debtor"), provides this Disclosure Statement (hereinafter "Statement") to all of its known creditors as required by Section 1125 of the Bankruptcy Code. The purpose of the Statement is to disclose that information deemed by Debtor to be material and necessary to enable its creditors to reach a reasonable, informed decision in the exercise of their right to vote for the acceptance or rejection of Debtor's Plan of Reorganization. The Plan of Reorganization (hereinafter the "Plan"), which is dated February 15, 1985, is on file with the Bankruptcy Court. A copy of the Plan is attached to this Statement as Exhibit "A".

THE FINANCIAL INFORMATION CONTAINED IN THIS DISCLOSURE STATEMENT WAS PREPARED BY AGENTS AND EMPLOYEES OF THE DEBTOR AND HAS NOT BEEN AUDITED; HOWEVER, THE INFORMATION IS ACCURATE AND COMPLETE TO THE BEST OF THEIR KNOWLEDGE.

NO REPRESENTATIONS CONCERNING THE DEBTOR, THIS DISCLOSURE STATEMENT, OR THE DEBTOR'S PLAN OF REORGANIZATION OTHER THAN AS SET FORTH IN THIS STATEMENT AND THE DEBTOR'S PLAN OF REORGANIZATION ARE AUTHORIZED BY THE DEBTOR.

II.

THE COMPANY

A. HISTORY OF THE COMPANY

Holywell Corporation, a Delaware corporation, was incorporated in October of 1976 for the purpose of owning and operating commercial real estate. Holywell, through its wholly owned subsidiary corporations, provides a full range of services which include building design, construction management, parking, security, janitorial, mechanical, and property management.

Debtor, from 1976 through 1980, was involved with office buildings in Washington, D.C.; Arlington, Virginia; and Tucson, Arizona. In addition, Debtor, through a subsidiary, acquired a tract of land in Charleston, South Carolina as a hotel and convention center site. Although the necessary approvals for constructing the project in South Carolina were obtained, Debtor did not undertake the construction of the hotel or convention center. All of the above-described buildings and land owned by Holywell and its subsidiaries since have been sold.

Debtor became involved in the Miami Center project in 1979. At that time, Holywell, through its wholly owned subsidiary, Miami Center Corporation ("MCC") formed a partnership with Theodore Gould, known as Chopin Associates. This partnership purchased the land on which the Pavillon Hotel, the Podium, and the Edward Ball Office Building are located. In addition, Holywell's subsidiary, Miami Center Corporation, became a general partner of Miami Center Limited Partnership ("MCLP"), the owner of the buildings now known as the Pavillon Hotel, the Podium, and the Edward Ball Office Building.

Construction of the Pavillon Hotel, the Podium, and the Edward Ball Office Building commenced in 1980. Soon after construction began, the rate of inflation and costs of

construction began to increase, and the interest rates payable by MCLP on its construction loan rose dramatically and unpredictably to a rate of interest well in excess of 20 percent per annum. In addition, there were delays caused by disputes between MCLP and Bank of New York involving the requisition process, a change of general contractor, and other matters also to be resolved.

The delays, escalating interest rates, and increased costs caused MCLP to suffer cost "overruns." By mid-1982, MCLP had expanded all of the committed construction loan funds and required additional funds to complete the Miami Center Project. The construction lender, Bank of New York, to ensure sufficient collateral during the period of construction, required that Holywell and others guarantee the repayment of the additional funds required to complete construction. In the spring of 1984, Bank of New York declared the loan of MCLP to be in default and initiated foreclosure proceedings in July of 1984.

MCLP (and its guarantors, including Holywell) were unable to repay Bank of New York because there was no permanent financing for the hotel, podium, and office building. MCLP and its guarantors, including Holywell, had to file these Chapter 11 proceedings to obtain sufficient time to accomplish three objectives in order that their business could continue. These objectives were:

1. Obtain permanent financing for the Miami Center Project or to obtain a purchaser; thus obtaining funds to repay the Bank of New York and the other creditors;
2. Complete the Miami Center complex and obtain a certificate of completion; and
3. Obtain operating capital.

Debtors, since the filing of the Chapter 11 proceedings, are attaining the three objectives in that the properties in

the District of Columbia and Arlington, Virginia owned by subsidiaries of Holywell have been sold. The proceeds of those sales are \$32,469,718. Debtors also have had the Pavillon Hotel, the Podium, and the Edward Ball Office Building appraised by Clinton M. Hamilton, M.A.I., of the McCune Company, dated January 22, 1985. The appraised value of the land, the Pavillon Hotel, the Podium, and the Edward Ball Building is \$260,400,000 which does NOT include any value for furniture, fixtures, and equipment ("FF&E"). The FF&E was determined to have an additional value of \$14,500,000.

Approximately \$3 million of the \$32 million has been loaned by Holywell to MCLP to complete construction of the Miami Center Project and obtain a certificate of completion. The balance will be utilized, after the payment of creditors, as initial working capital for the Miami Center Project.

B. *FINANCIAL STATEMENTS*

The Company has attached to this Disclosure Statement as Exhibit "B" its Balance Sheet as of December 31, 1983. Its Pro Forma Balance Sheet as of February 15, 1985 is attached as Exhibit "C". The substantial increase in assets of the Company is the result of a favorable sale of three office buildings, in which the Company had a substantial interest. These office buildings were sold at the end of 1984.

C. *PENDING LITIGATION*

The Company has attached as Exhibit "D" a schedule of all litigation in which the Company is a party. An explanation of the Company's involvement in each lawsuit is explained in Exhibit "D", as well as the actual amount at issue in that litigation based upon an estimate by the law firm handling that litigation.

III. PLAN OF REORGANIZATION

THE FOLLOWING IS A SIMPLIFIED SUMMARY OF THE TERMS OF THE COMPANY'S PLAN OF REORGANIZATION, A COPY OF WHICH IS ATTACHED HERETO AS EXHIBIT "A" AND TO WHICH REFERENCE SHOULD BE MADE FOR AN EXAMINATION OF THE SPECIFIC TERMS OF THE PLAN. THIS SUMMARY IS QUALIFIED IN ITS ENTIRETY BY REFERENCE TO THE PLAN.

A. SUMMARY OF PLAN

1. *Classification of Creditors' Claims*

The claims and interests are classified as follows:

a) *Class 1:* Allowed expenses of administration including the fees and expenses of attorneys for the Debtor; the attorneys for the Creditors' Committee; Special Counsel for litigation engaged pursuant to Orders of the Court; appraisers, accountants, and agents of Debtor.

b) *Class 2:* All unsecured Allowed Claims entitled to priority under 11 U.S.C. §507(a)(3) and (4) which include the claims for wages, salaries and commissions up to \$2,000 for each individual.

c) *Class 3:* Tax claims of governmental units to the extent they are entitled to priority under 11 U.S.C. §506 and 11 U.S.C. §507(a)(6).

d) *Class 4:* The secured claims of the Bank of New York dated October 14, 1983 in the amount of \$1,750,000, plus interest, which claim is secured by a security interest in the stock of Holywell and its subsidiary companies. These companies sold either all or substantially all of their assets in December of 1984.

e) *Class 5:* The Allowed Claims of the Bank of New York which are secured by Debtor's guarantees of the

mortgage notes payable to the Bank of New York by Miami Center Limited Partnership and Chopin Associates.

f) *Class 6: The Allowed Claims of judgment creditors of the Debtor as follows:*

1) John Thomas Batts, Inc. — A judgment obtained on November 18, 1983 against Debtor, Theodore B. Gould and Pavillon Hotel of which \$1,000 remains due as of May 8, 1984, plus interest.

2) Kelly Services, Inc. — A judgment obtained on May 15, 1984 in the amount of \$1,770.95, plus interest.

3) Economics Laboratories, Inc. — A judgment obtained on August 18, 1984 in the amount of \$31,257.75, plus interest.

4) Howard Brandston Lighting Design, Inc. — A judgment obtained on July 25, 1984 in the Supreme Court of New York in the amount of \$8,655.00, plus interest.

g) *Class 7: The Allowed Claims of all non-priority unsecured creditors whose claims are \$1,000 or less.*

h) *Class 8: The Allowed Claims of all other non-priority unsecured creditors.*

i) *Class 9: The Allowed Claims of all Affiliated Creditors.*

2. *Treatment of Claims*

Under the terms of the Plan, Allowed Claims against the Company are classified and treated as described below:

a) *Class 1: Administrative Expenses and Claims*

Class 1 Claims consist of all administrative expenses and Allowed Claims specified under §§503(b) and 507(a) of the Bankruptcy Code. Class 1 Claims are not impaired

under the Plan and the holders of such claims will be paid in full in cash on the Consummation Date or under such other terms as may be agreed to by the Company and the respective holders of Class 1 Claims. Since Class 1 Claims are not impaired, solicitation of acceptance of the Plan from holders thereof is not required under §1126(f) of the Bankruptcy Code and the holders of such claims are deemed to have accepted the Plan.

b) *Classes 2 and 3: Priority Unsecured Claims*

Class 2 and Class 3 Claims are priority claims under 11 U.S.C. §507(a). Class 2 Claims relate to unsecured claims for wages, salaries, or commissions up to \$2,000 for each individual. Class 3 Claims relate to tax claims owed to governmental units. Class 2 and Class 3 Claims are not impaired and will be paid in full on the Consummation Date.

c) *Class 4 Claims*

The Class 4 Claim of the Bank of New York is unimpaired and will be paid in full (including interest) on the Consummation Date.

d) *Class 5 Claims*

The Class 5 Claims of the Bank of New York are claims based upon the Company's guarantee of certain of Miami Center Limited Partnership's mortgage notes payable to that Bank. This claim is impaired to the extent only that the Bank of New York will not have its Allowed Claim paid until the sale of the Pavillon Hotel, Edward Ball Office Building and Podium. At the closing of that sale, presently scheduled for September 1985, the Allowed Claim of the Bank of New York will be paid in full.

e) *Class 6 Claims*

The Class 6 Claims, which are judgments against the Company, are unimpaired and will be paid in full on the Consummation Date.

f) *Class 9 Claims*

The Class 9 Claims represent debts owed by the Company to Affiliated Creditors, including other Chapter 11 estates consolidated with the Company's proceedings for administrative purposes. The claims of these Affiliated Creditors will be impaired, in that no payments will be made to any Affiliated Creditors until all other Allowed Claims, both secured and unsecured, have been paid in full.

g) *Classes 7 and 8 Claims*

The Class 7 and Class 8 Claims, which represent all non-priority, unsecured claims, are not impaired. All Allowed Claims of non-priority, unsecured creditors will be paid on the Consummation Date.

B. CLAIMS OF DEBTOR

Debtor will pursue all claims which shall arise either as a claim to be filed by Debtor or as a counterclaim in existing litigation.

C. CASH FLOW

Debtor, at the present time, is generating approximately \$180,000 a month in income. Debtor also is incurring expenses in connection with the termination of affairs of a number of its subsidiary companies. These expenses range between \$50,000 and \$75,000 a month and will continue for approximately three or four more months. At the present time, Debtor has no other expenses.

IV. LIQUIDATION ANALYSIS

This liquidation analysis is based upon the simultaneous liquidation of the Company and its affiliated companies, including Miami Center Limited Partnership. The schedule which is attached as Exhibit "E" shows the value of the assets of the Company and the amount available for distribution to its creditors in the event of an orderly sale or refinancing of the assets of Miami Center Limited Partnership. The second column is the opinion of the Company of the amounts which would be available for distribution to the Company's creditors in the event of a distress sale of the assets of Miami Center Limited Partnership.

An explanation of the amount available under liquidation is required. If the Company and its affiliated companies are liquidated, all of the cash now held by the Company would be paid to the Bank of New York to partially satisfy the Company's guaranty of the debt owed by Miami Center Limited Partnership to that creditor. Upon the distress sale of the assets of Miami Center Limited Partnership a sufficient amount should be received to pay the balance owed the Bank of New York, with some additional funds available. From these additional funds, Holywell is entitled to be repaid first, its priority, post-filing loan from the Miami Center Limited Partnership. The amount drawn by Miami Center Limited Partnership under that loan is presently \$490,000. Thus, at least this amount ultimately would be available to the unsecured creditors of the Company. It is difficult to speculate if any additional amounts would be disbursed to the Company by Miami Center Limited Partnership.

It is believed that a liquidation of the Company (and its affiliated companies) would not be in the best interest of the unsecured creditors. These creditors, under a liquidation, might not be paid in full and would have to await the liquidation of Miami Center Limited Partnership to receive any distribution.

V. FEASIBILITY OF PLAN

The Plan of Reorganization proposed by Debtor is feasible. The Plan is not tied to the speculative, future success of Debtor's business, but to a specific sale of assets that will yield sufficient monies to pay the claims, as allowed, of all creditors in full. Debtor has proposed that an equitable subordination of the debt owed to the Bank of New York under §510 (c) of the Bankruptcy Code is necessary. Debtor believes that many of the problems giving rise to these proceedings were caused by the Bank of New York's conduct.

Debtor, Miami Center Limited Partnership, the primary obligee under the Bank of New York mortgage, has substantial equity in its assets. To permit a foreclosure of the lien of the Bank of New York on the Consummation Date would be to reward and unjustly enrich the Bank of New York, to the loss of all other creditors, who would receive nothing.

Finally, it is felt that the Bank of New York will not be prejudiced by the equitable subordination. It will be paid in full; although it will not receive payment until several months after the Consummation Date. It should not be prejudiced because it is a bank (as opposed to a tradesman or wage earner) in the business of loaning money. The loan is well secured, and the Bank of New York will receive all funds to which it is entitled, including interest.

VI. OFFICERS AND DIRECTORS OF REORGANIZED COMPANY

The present officers and directors of the Company will continue to serve in their present offices.

VII. DETERMINATION OF ALLOWED CLAIMS

The Plan provides for payments to be made only to those holding Allowed Claims in the various classes. There are two methods by which claims may become Allowed Claims entitled to payment under the Plan. First, the Debtor has

previously filed with the Court schedules which set forth all known claims against Debtor. If the schedules not have denominated a particular claim as "contingent," "unliquidated," or "disputed," that scheduled claim is deemed allowed. If Debtor objects to that claim, there will be a hearing, and the Court will determine the validity and amount of the claim.

The second method through which one may obtain an Allowed Claim is through the filing of a Proof of Claim. Opportunity has been provided for any party to file a Proof of Claim. The filing of a Proof of Claim is required to assert any claim not shown in the schedules or to assert a claim shown as "contingent," "unliquidated," or "disputed." The filing of a Proof of Claim also is required by any person seeking to assert an amount or classification different than that shown in the schedules. Upon filing, a Proof of Claim supersedes the information shown in the schedules. As with scheduled claims, a Proof of Claim will become an Allowed Claim unless objection is made thereto.

The original deadline for filing Proofs of Claims against Debtor was December 20, 1984; however, the Court extended that deadline to January 15, 1985.

VIII. CONFIRMATION PROCEDURE

A. *Purpose of Disclosure Statement.* This Disclosure Statement is provided to each creditor of an impaired class whose claim or interest has been scheduled by the Debtor or who has filed a Proof of Claim with the Court. This Disclosure Statement is intended to assist creditors in evaluating the Plan and determining whether to accept or reject it.

B. *Solicitation of Acceptances.* Under the Bankruptcy Code, your acceptance of the Plan may not be solicited unless you receive a copy of this Disclosure Statement prior to or concurrently with such solicitation.

C. *Confirmation Hearing.* The hearing on confirmation of the Plan has been scheduled by the Bankruptcy Court for 9:30 o'clock A.M. on April 29, 1985, in Courtroom 1406, 51 Southwest First Avenue, the Federal Building, Miami, Florida.

At the confirmation hearing, the Bankruptcy Court will determine whether to confirm the Plan. In order to confirm the Plan, the Bankruptcy Court must find that Debtor has complied with the good faith and disclosure requirements of the Bankruptcy Code, that the distribution under the Plan to any dissenting creditor or Shareholder is no less than the distribution he would receive if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code, that confirmation of the Plan is not likely to be followed by liquidation or the need for further financial reorganization of the Debtor, and that at least one class of claims has accepted the Plan.

D. *Confirmation by the Acceptance Method.* The Bankruptcy Court may confirm the Plan if it finds that the above requirements for confirmation have been met and that all impaired classes have accepted the Plan.

A class of claims accepts the Plan if a majority of its voting members vote to accept the Plan and that majority which has voted to accept the Plan holds at least two-thirds of the total dollar amount of claims held by all class members voting on the Plan.

E. *Confirmation by the Non-Acceptance Method.* The Bankruptcy Code also provides that the Plan may be confirmed notwithstanding its rejection by one or more impaired classes, so long as at least one class has accepted the Plan.

The Bankruptcy Court also may confirm the Plan at the Debtor's request, although all impaired classes have voted to reject the Plan, if the Court finds that the Plan does not discriminate unfairly and is fair and equitable with respect to each rejecting class.

The Plan is deemed fair and equitable if it provides that each holder of a secured claim in the class retains his lien and receives deferred cash payments totalling at least the allowed amount of his claim, of a value, as of the effective date of the Plan, of at least the value of his secured interest in the property subject to his lien.

DATED this [illegible] day of March, 1985.

HOLYWELL CORPORATION

By /s/ Theodore B. Gould
Its President

KENT, WATTS & DURDEN

By /s/ Fred H. Kent, Jr.
FRED. H. KENT, JR.

/s/ Robert C. Nichols
ROBERT C. NICHOLS

/s/ Betsy C. Cox
BETSY C. COX

850 Edward Ball Building
Post Office Box 4700
Jacksonville, Florida 32201
(904) 354-1600

Attorneys for Debtor

Exhibit "A"

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

Chapter 11 Proceedings

CASE NO. 84-01590-BKC-TCB

IN RE:

HOLYWELL CORPORATION,

Debtor.

AMENDED PLAN OF REORGANIZATION

TABLE OF CONTENTS

- I. Definitions
- II. Classification of Claims
- III. Treatment of Claims
- IV. Execution and Implementation of Plan
- V. Provisions as to Executory Contracts
- VI. Enforcement and Settlement of Debtor's Claims
- VII. Modification of Plan
- VIII. Jurisdiction of the Court

Holywell Corporation, debtor in possession, submits the following Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code:

ARTICLE I
DEFINITIONS

1.01 *COMPANY*: Holywell Corporation, the Debtor in Possession.

1.02 *DEBTOR*: Holywell Corporation, the Debtor in Possession.

1.03 *COURT*: The United States Bankruptcy Court, Southern District of Florida, the United States District Court for the Southern District of Florida and/or the presiding Bankruptcy Judge or District Court Judge as shall be applicable or appropriate.

1.04 *PLAN*: This Plan of Reorganization in its present form or as it may be amended or modified from time to time.

1.05 *ALLOWED CLAIM*: Any duly scheduled or timely filed claim which is neither contingent, nor unliquidated, nor disputed or a claim which has been determined by the Court in an Order of Judgment which is no longer subject to an appeal or certiorari proceeding, or as to which neither an appeal nor certiorari proceeding is pending, on which claims accrued interest shall be paid at the rate of 12% per annum for both the period prior to the filing of the petition as well as subsequent to the filing of the petition.

1.06 *AFFILIATED CREDITORS*: Those corporations which are subsidiaries of the Company, those entities in which the Company owns an equity interest and the other debtors in possession, i.e., Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould.

1.07 *CONSUMMATION DATE*: The first business day following the date on which the Order confirming the Plan becomes final and no longer subject to appeal.

ARTICLE II

CLASSIFICATION OF CLAIMS

The claims and interests are classified as follows:

2.01 *Class 1:* Allowed expenses of administration including the fees and expenses of attorneys for the Debtor; the attorneys for the Creditors' Committee; Special Counsel for litigation engaged pursuant to Orders of the Court; appraisers, accountants, and agents of Debtor.

2.02 *Class 2:* All unsecured Allowed Claims entitled to priority under 11 U.S.C. §507(a)(3) and (4) which include the claims for wages, salaries and commissions up to \$2,000 for each individual.

2.03 *Class 3:* Tax claims of governmental units to the extent they are entitled to priority under 11 U.S.C. §506 and 11 U.S.C. §507(a)(6).

2.04 *Class 4:* The secured claims of the Bank of New York dated October 14, 1983 in the amount of \$1,750,000, plus interest, which claim is secured by a security interest in the stock of Holywell and its subsidiary companies. These companies sold either all or substantially all of their assets in December of 1984.

2.05 *Class 5:* The Allowed Claims of the Bank of New York which are secured by Debtor's guarantees of the mortgage notes payable to the Bank of New York by Miami Center Limited Partnership and Chopin Associates.

2.06 *Class 6:* The Allowed Claims of judgment creditors of the Debtor as follows:

a) John Thomas Batts, Inc. — a judgment obtained on November 18, 1983 against Debtor, Theodore B. Gould and Pavillon Hotel of which \$1,000 remains due as of May 8, 1984, plus interest.

b) Kelly Services, Inc. — a judgment obtained on May 15, 1984 in the amount of \$1,770.95, plus interest.

c) Economics Laboratories, Inc. — a judgment obtained on August 18, 1984 in the amount of \$31,257.75, plus interest.

d) Howard Brandston Lighting Design, Inc. — a judgment obtained on July 25, 1984 in the Supreme Court of New York in the amount of \$8,655.00, plus interest.

e) Western Union International, Inc. — a judgment obtained on June 6, 1984 in the amount of \$861.52 plus interest.

f) Barton Aschman Assoc., Inc. — a judgment obtained on July 30, 1984 in the amount of \$58,173.11, plus interest.

2.07 *Class 7:* The Allowed Claims of all non-priority unsecured creditors whose claims are \$1,000 or less.

2.08 *Class 8:* The Allowed Claims of all other non-priority unsecured creditors.

2.09 *Class 9:* The Allowed Claims of all Affiliated Creditors.

ARTICLE III

TREATMENT OF CLAIMS

Under the terms of the Plan, Allowed Claims against the Company are treated as described below:

3.01 *Class 1: Administrative Expenses and Claims*

Class 1 Claims consist of all administrative expenses and Allowed Claims specified under §§503(b) and 507(a) of the Bankruptcy Code. Class 1 Claims are not impaired under the Plan and the holders of such claims will be paid in full in cash on the Consummation Date or under such other terms as may be agreed to by the Company and the respective

holders of Class 1 Claims. Since Class 1 Claims are not impaired, solicitation of acceptance of the Plan from holders thereof is not required under §1126(f) of the Bankruptcy Code and the holders of such claims are deemed to have accepted the Plan.

3.02 Classes 2 and 3: Priority Unsecured Claims

Class 2 and Class 3 Claims are priority claims under 11 U.S.C. §507(a). Class 2 Claims relate to unsecured claims for wages, salaries, or commissions up to \$2,000 for each individual. Class 3 Claims relate to tax claims owed to governmental units. Class 2 and Class 3 Claims are not impaired and will be paid in full on the Consummation Date.

3.03 Class 4 Claims

The Class 4 Claim of the Bank of New York is unimpaired and will be paid in full (including interest) on the Consummation Date.

3.04 Class 5 Claims

The Class 5 Claims of the Bank of New York are claims based upon the Company's guarantee of certain of Miami Center Limited Partnership's mortgage notes payable to that Bank. This claim is impaired to the extent only that the Bank of New York will not have its Allowed Claims paid until the sale of the Pavillon Hotel, Edward Ball Office Building and Podium. At the closing of that sale, presently scheduled for September 1985, the Allowed Claim of the Bank of New York will be paid in full.

3.05 Class 6 Claims

The Class 6 Claims, which are judgments against the Company, are unimpaired and will be paid in full on the Consummation Date.

3.06 Class 9 Claims

The Class 9 Claims represent debts owed by the Company to Affiliated Creditors, including other Chapter 11 estates

consolidated with the Company's proceedings for administrative purposes. The claims of these Affiliated Creditors will be impaired, in that no payments will be made to any Affiliated Creditors until all other Allowed Claims, both secured and unsecured, have been paid in full.

3.07 Classes 7 and 8 Claims

The Class 7 and Class 8 Claims, which represent all non-priority, unsecured claims, are not impaired. All Allowed Claims of non-priority, unsecured creditors will be paid on the Consummation Date.

ARTICLE IV EXECUTION AND IMPLEMENTATION OF THE PLAN

The funds necessary for the satisfaction of all of the Debtor's debt will be derived from two sources: first, a contract by and between Miami Center Limited Partnership and Hadid Investment Group, Inc., a copy of which is attached as Exhibit "A"; second, approximately \$28,000,000 in cash which the Company has placed in a segregated interest bearing account.

The monies realized from the sale to Hadid of the Edward Ball Office Building, the Pavillon Hotel and the Podium will be sufficient to pay all of the creditors of Miami Center Limited Partnership thereby releasing this Debtor from its guarantee to the Bank of New York. Although the Bank of New York has stated that a sale might not realize sufficient proceeds to satisfy its claim, it has included in the total amount owed to creditors, in excess of \$27,000,000 which is owed by Miami Center Limited Partnership to Affiliated Creditors. These Affiliated Creditors will not receive any distribution until all other Allowed Claims, secured and unsecured, have been paid in full.

The Allowed Claims of all the secured and unsecured creditors of this Debtor, Miami Center Limited Partnership,

Miami Center Corporation, Chopin Associates and Theodore B. Gould (after deducting the claim of the Bank of New York and the inter-company claims of the Affiliated Creditors) is approximately 8½% of the total claims. The inter-company claims of the Affiliated Creditors is approximately 11½% of the total claims and the claims of the Bank of New York about 80% of the total claims.

Debtor's Plan proposes that upon confirmation of the Plan of Reorganization, that all Allowed Claims of the secured and unsecured creditors of this Debtor, except the Bank of New York and any Affiliated Creditors, be paid in full. This Debtor then would make loans to Miami Center Limited Partnership, Chopin Associates and Theodore B. Gould for the sole purpose of paying the Allowed Claims of the secured and unsecured creditors of those estates with the exception of the Bank of New York, Olympia & York Florida Equity Corporation and the Affiliated Creditors. After payment of those claims, this Debtor still would have in excess of \$10,000,000 in cash.

The claim of Olympia & York Florida Equity Corporation is based upon an Arbitration Award. It is believed that this Award will not become a final Award (and no longer subject to appeal) within the next 9 to 12 months. The Allowed Claim of the Bank of New York also will be affected by litigation which has been filed by Miami Center Limited Partnership against the Bank of New York in the United States District Court for the Southern District of Florida.

Debtor's Plan necessarily incorporates the provisions of § 510(c) of the Bankruptcy Code which would provide for the equitable subordination of the lien of the Bank on New York. This is the *only* basis on which the balance of the secured and unsecured creditors of the Debtor will be paid. To permit the Bank of New York to foreclose its lien first would result in the Bank of New York being *given* the substantial equity in the assets of all of the Debtors to the detriment of the other creditors of these estates.

ARTICLE V

EXECUTORY CONTRACTS

Debtor hereby assumes all executory contracts except those executory contracts listed in Exhibit "B" hereto, which Debtor hereby rejects pursuant to § 1123(b)(2) of the Bankruptcy Code.

ARTICLE VI

ENFORCEMENT AND SETTLEMENT OF DEBTOR'S CLAIMS

Debtor shall retain the right to settle, adjust, or enforce any claim or interest belonging to the Debtor, whether for the benefit of the Debtor or its assigns.

ARTICLE VII

MODIFICATION OF THE PLAN

The Debtor, upon notice to the Creditors' Committee and with leave of Court, may propose amendments or modifications of this plan at any time prior to confirmation. After confirmation, the Debtor, with approval of the Court, may remedy any defect or omission, or reconcile any inconsistencies in the plan or in the order of confirmation, as may be necessary to carry out the purposes and effect of this plan, if it does not materially or adversely affect the interests of creditors.

ARTICLE VIII

JURISDICTION OF THE COURT

The Court will retain jurisdiction until this Plan has been fully consummated, including, but not limited to, the following purposes:

8.01. The classification of any claim, including the re-examination of claims which have been allowed for purposes of voting, and the determination of objections as may be filed to creditors' claims. The failure by the Debtor to object to,

or to examine any claim for the purposes of voting, shall not be deemed to be a waiver of the Debtor's right to object to, or re-examine the claim in whole or in part.

8.02. Determination of all questions and disputes regarding title to the assets of the estate, and the determination of all causes of action, controversies, disputes, or conflicts, whether or not subject to action pending as of the date of confirmation, between the Debtor and any other party, including, but not limited to, any right of the Debtor to recover assets pursuant to the provisions of the Bankruptcy Code.

8.03. The correction of any defect, the curing of any omission, or the reconciliation of any inconsistency in this Plan or the Order of Confirmation as may be necessary to carry out the purposes and intent of this Plan.

8.04. The modification of this Plan after confirmation pursuant to the Bankruptcy Code.

8.05. The enforcement and interpretation of the terms and conditions of this Plan.

8.06. Entry of any order, including injunctions, necessary to enforce the title, rights, and powers of the Debtor and to impose such limitations, restrictions, terms and conditions of such title, rights, and powers as this Court may deem necessary.

8.07. Entry of an order concluding and terminating this case.

Dated this [illegible] day of March, 1985.

HOLYWELL CORPORATION

By: /s/ Theodore B. Gould

Theodore B. Gould

KENT, WATTS & DURDEN

By: /s/ Robert C. Nichols

Robert C. Nichols

By: /s/ Betsy C. Cox

Betsy C. Cox

850 Edward Ball Building
Post Office Box 4700
Jacksonville, Florida 32201
(904) 354-1600

EXHIBIT "A"
to the Plan of Reorganization

PURCHASE AGREEMENT
dated as of February 11, 1985

between
HADID INVESTMENT GROUP, INC., TRUSTEE
as Purchaser
and
MIAMI CENTER LIMITED PARTNERSHIP
and
CHOPIN ASSOCIATES
as Sellers

and does not discriminate unfairly under § 1129(b).⁹ Furthermore, the Bank asserts that O&Y/MCJV's claim is not substantially similar to other claims or interests, because 50% of any distribution on MCJV's claim would go to debtor Gould. However, having reviewed the facts and the relevant legal principles, I conclude that the Bank is incorrect.

Under the Bank's plan, O&Y/MCJV's claim cannot be paid until all claims filed by other creditors not affiliated with Gould have been satisfied. In effect, this classification structure means that even general unsecured creditors will be paid before O&Y/MCJV. To justify its treatment of the O&Y/MCJV claim, the Bank relies heavily on the factual premise that any distribution on the O&Y/MCJV claim will benefit Gould. However, this premise is incorrect. Any payment to O&Y/MCJV based on the FF&E leases *would not* benefit debtor Gould. In fact, Gould's share of any MCJV proceeds, rents, or profits are available to the liquidating trustee, since "*all* legal or equitable interests of the debtor in property as of the commencement of the case," or any "[p]roceeds, . . . rents, or profits of or from property of the estate . . ." become part of the bankruptcy estate. 11 U.S.C.A. § 541(a) (Supp. 1986) (emphasis added). *See also In re Wallen*, 43 Bankr. 408, 409 (D. Idaho 1984); *Houchen v. Gadberry (In re Gadberry)*, 30 Bankr. 13, 14 (C.D. Ill. 1983); *Dominican Fathers of Winona v. Dreske (In re Dreske)*, 25 Bankr. 268, 271 (E.D. Wis. 1982); *Don/Mark Partnership v. James B. Nutter & Co., (In re Don/Mark Partnership)*, 14 Bankr. 830, 832 (D. Colo. 1981); *cf. Missouri v. Eastern*

⁹11 U.S.C.A. § 1129(b)(1) provides:

(b)(1) Notwithstanding section 510(g) of this title if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

District of Arkansas, 647 F.2d 768 (8th Cir. 1981) (court held that debtor's 2.3% fractional interest in deposited grain was sufficient to bring all property under the bankruptcy court's jurisdiction). In short, any interest Gould held in MCJV became part of the bankruptcy estate upon the commencement of this case.

The Bank's position is incorrect for another reason. The plan must satisfy the requirements of code sections 1122, 1123, and 1129. While the Bank feels that the plan's classification structure fulfills all of these code requirements, I disagree.

Classification is simply the process under which the plan's proponent recognizes the legal differences between various claims and interests, and ranks them according to their nature and priority. See *Scherk v. Newton (In re Rocky Mountain Fuel Co.)*, 152 F.2d 747, 750-51 (10th Cir. 1945); *Seidel v. Palisades-on-the Desplains (In re Palisades-on-the Desplains)*, 89 F.2d 214, 217 (7th Cir. 1937). See also 11 U.S.C.A. § 1129(b) (1979). A party submitting a plan of reorganization has considerable discretion to determine the proper classification of claims and interests according to the unique factual circumstances presented; however, ". . . there must be some limit on a debtor's power to classify creditors in such a manner. The potential for abuse would be significant otherwise." *Teamsters National Freight Industry Negotiating Committee v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 586 (6th Cir. 1986). The result is not surprising—considerable discretion is permitted in determining the proper classification of claims and interests; however, if the plan unfairly creates too many or too few classes, or violates basic priority rights, the court cannot confirm the plan. See *id.* Thus, classification principles cannot be employed to effectuate the subordination of valid claims. See *In re Martin's Point Limited Partnership*, 12 Bankr. 721 (Bankr. N.D. Ga. 1981); 11 U.S.C.A. § 1129(b).

One final point merits discussion under the "classification" issue. In its initial brief, the Bank argued that the MCJV claim is partially an equity interest. Yet, even if this assertion were true, it would not justify the subordination of a valid claim. *Id.* at 727 ("... a claim of a creditor who is also an equity security holder is not to be subordinated to the claim of a creditor who is not also an equity security holder, but is to be treated equally.").

C. *Claims of An Insider*

In support of the plan's classification structure, the Bank emphasizes O&Y/MCJV's status as an insider.¹⁰ The Bank argues that appellant's status is significant for two reasons. First, the Bank argues that insider creditors may not be given the same priority as unsecured creditors. *In re Toy & Sports Warehouse, Inc.*, 37 Bankr. 141, 152 (Bankr. S.D.N.Y. 1984) *In re Economy Cast Stone Co.*, 16 Bankr. 647, 651 (Bankr. E.D. Va. 1981). Alternatively, the Bank asserts that an insider creditor's claims must be closely scrutinized to determine whether equitable subordination is warranted. *Estates v. N&D Properties, Inc. (In re N&D Properties, Inc.)*, 799 F.2d 726, 731 (11th Cir. 1986); *Multiponics*, 622 F.2d 709, 714 (5th Cir. 1980). If the claimant is an insider, the party seeking equitable subordination need present only "material evidence of unfair conduct," and need not provide proof of, "more egregious conduct such as fraud, spoilation or overreaching." *Estes* at 731.

O&Y/MCJV responds with two arguments. First, appellant contends that it is not an insider in the legal connotation of the term. Second, appellant assumes a "fallback" position arguing that the mere invocation of the

¹⁰MCJV is an insider because it is a "partnership in which the debtor is a general partner." 11 U.S.C.A. § 101(28)(A)(ii) (Supp. 1986). O&Y is an insider because it is a "general partner of the Debtor." 11 U.S.C.A. § 101(28)(A)(iii) (Supp. 1986).

term "insider" without more, does not serve to meet any standard or test required by law for equitable subordination.

The code is clear regarding the definition of an insider. In this case, it is beyond question that O&Y and MCJV are insiders. See 11 U.S.C.A. § 101(28)A(ii) and (iii). However, the insider label is not sufficient, in and of itself, to justify the subordination of a claim. Insiders' claims and rights must be treated in the same manner as other rights and claims in the absence of proof of nefarious or inequitable conduct directed toward and resulting in harm to creditors. See *Estes* at 731; *Multiponics* at 713; *Huffman* at 212. Further, appellant asserts that even where the claimant is an insider the proponent of the plan bears the burden of presenting material evidence of inequitable and unfair conduct damaging the creditors. See *Multiponics* at 714; *Estes* at 731.

Two cases are particularly relevant regarding the subordination of an insider's claim. In *Huffman*, the Fifth Circuit found that "Huffman was an insider." *Id.* at 211. Nevertheless, the court indicated that the three-prong test of *Mobile* still had to be satisfied. "Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the trustee has discharged his burden of proof thereunder." *Id.* at 212.

Very recently, the Eleventh Circuit examined this issue in *Estes*, and followed the teachings of *Mobile* and *Huffman*. The court expressly stated that three elements must be established before a claim may be equitably subordinated. See *Estes* at 731. Where the claimant is an insider, the trustee's burden of proof in establishing evidence of unfair

conduct is somewhat lessened, but the claim is not automatically subordinated. *See id.*¹¹

D. *Equitable Subordination*

The principle of subordination is firmly established in bankruptcy proceedings. This doctrine permits the court to lower the priority of a valid claim to achieve an equitable result when the claimant has been guilty of improper conduct.¹² 3 *Collier on Bankruptcy* ¶ 510.02 (15th Ed. 1986). Although the doctrine was judicially created,¹³ it has now been codified within the bankruptcy code. Currently, the relevant provision is found at 11 U.S.C.A. § 510(c) which provides:

§ 510 Subordination

* * *

(c) Notwithstanding subsection (a) and (b) of this section, after notice and a hearing, the court may—

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest, or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

¹¹Significantly, I note that Congress specifically rejected a provision which would have automatically subordinated certain insider claims as a matter of law. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 74 (1978); H. R. 31, 95th Cong., 1st Sess. (1977).

¹²Subordination is not the same as disallowance. "If a creditor's misconduct has been directed toward the debtor . . . the claim . . . is disallowed." 3 *Collier on Bankruptcy*, ¶ 510.02 (15th Ed. 1986). Subordination is employed when a claim is valid, but the claimant's conduct is such that equitable considerations require it to be paid after other claims have been satisfied. *See id.*

Section 510(c) authorizes subordination when the court finds that an equitable remedy is required. Established case law, however, continues to be significant because § 510(c) indicates that its application should follow equitable principles. See 3 *Collier on Bankruptcy* ¶ 510.01 (15th Ed. 1986). To resolve subordination situations, the Fifth Circuit established a three part test to determine when a claim or interest should be subordinated. See *Mobile* at 700. This test has been expressly adopted by the Eleventh Circuit. See *Estes* at 731. The three elements of the test include:

- (1) that the claimant has engaged in inequitable conduct;
- (2) that the conduct has injured creditors or given unfair advantage to the claimant; and
- (3) that subordination of the claim is not inconsistent with the Bankruptcy Code.

Id. (citation omitted).

In proving the elements for equitable subordination, one must first determine the status of the claim holder.

The burden and sufficiency of proof required are not uniform in all cases. Where the claimant is an insider or a fiduciary, the trustee bears the burden of presenting material evidence of unfair conduct. Once the trustee meets his burden, the claimant then must prove the fairness of his transactions with the debtor or his claim will be subordinated. If the claimant is not an insider or fiduciary, however, the trustee must prove more egregious conduct such as fraud, spoliation, or overreaching, and prove it with particularity.

Id. (citations omitted). Additionally, the trustees, or other moving party, must show the extent of any inquiry or unfair advantage to determine the extent to which the claim should be subordinated. The claim should only be subordinated to the extent necessary to offset the harm caused by the unfair

conduct. See *Benjamin* at 701, "For example, if a claimant guilty of misconduct asserts two claims, each worth \$10,000, and the injury he inflicted on the bankrupt or its creditors amounted to \$10,000, only one of his claims should be subordinated." *Id.* at 701. Finally, the evidence must show which creditors were disadvantaged, because a valid claim should only be subordinated to the claims of the disadvantaged creditors. See *Estes* at 732-33.

In this case, the bankruptcy court appears to have relied upon three facts to fulfill *Mobile's* tripartite test. First, the court imputed Gould's acts of misconduct to O&Y/MCJV as a matter of partnership and agency principles. Second, the court found that O&Y/MCJV was responsible for MCLP's undercapitalization. Third, the court found that O&Y substantially contributed to MCJV's and Gould's financial difficulties, to the detriment of other creditors, by failing to provide or arrange for the financing of Phases II and III of the Miami Center.

O&Y/MCJV challenges all of these facts and asserts that there is no semblance of proof of wrongful conduct of the claimant/appellant affecting the debtors' creditors. First, O&Y/MCJV argues that all of Gould's acts of misconduct were outside the course and scope of the partnership's business. In fact, Gould's conduct was *against* O&Y and the partnership's interest. Therefore, appellant urges that Gould's misconduct cannot be used to subordinate its claim. Second, O&Y/MCJV suggests that the theory of undercapitalization of MCLP is outrageous and incomprehensible. Appellant insists that MCJV was the victim of, not a contributor to, MCLP's poor financial situation. Finally, appellant states that everyone recognized that the construction of phases II and III of the Miami Center would have subjected Gould to even greater losses and further indebtedness. Thus, appellant's failure to provide financing for further development could not have injured any of the debtor's creditors.

After carefully considering the facts, I conclude that the evidence was insufficient to satisfy the elements of equitable subordination. First, I find that the court erred when it imputed Gould's acts of misconduct to O&Y/MCJV. These acts were clearly outside the ordinary course of the business of the partnership and not authorized by O&Y. *See Fla. Stat. Ann.* § 620.62 (1977).¹⁴ Second, I simply cannot accept appellee's theory of undercapitalization. Perhaps the best indication that the FF&E lease was valuable was that the trustee was required to obtain title to the FF&E under the plan. Therefore, it is unreasonable to believe that the valuable FF&E lease agreements injured any of the debtor's creditors, even if I could somehow attribute MCLP's financial situation to O&Y/MCJV. Finally, I find that insufficient evidence was offered to prove that O&Y's failure to provide further financing hurt any creditors or gave O&Y an unfair advantage. Under the circumstances, O&Y's decision seems sound.

III. CONCLUSION

After carefully reviewing the amended confirmation order, I find that the court erred in confirming the plan which placed the O&Y/MCJV lease claim in class 7 beneath even the unsecured creditors. The plan, as structured, is not fair and equitable with respect to the class 7 creditor. None of the theories presented by the Bank justify the subordination of O&Y/MCJV's claim. I must, therefore, remand the case so that the bankruptcy court can determine O&Y's share of the claim.

¹⁴*Fla. Stat. Ann.* § 620.62 (1977) reads as follows:

Partnership bound by partner's wrongful act.—When loss or injury is caused to a person, not a partner in the partnership, or any penalty is incurred by a wrongful omission of a partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, the partnership is liable for it to the same extent as the partner so acting or omitting to act. (emphasis added).

On remand, the bankruptcy court must resolve two issues. First, the bankruptcy court should determine the value of the lease claim. Then, it should determine the respective interest in this claim held by O&Y and the bankruptcy estate (in lieu of debtor Gould).¹⁵

Because the parties are in substantial disagreement regarding the payment of the claim, I feel compelled to resolve this point. O&Y should be paid:

(1) First, from the cash which remains available to the trustee;

(2) Second, from any property controlled by the trustee including Gould's interest in MCJV; and

(3) Finally, from the surety bond provided by the Bank to guarantee O&Y's payment under the plan.

For all of the reasons expressed in this opinion, the order of confirmation is reversed and remanded for further considerations not inconsistent with this opinion.

¹⁵O&Y and the Bank continue to dispute the interest each party holds concerning the lease claim. The bankruptcy court must determine what effect, if any, the arbitration proceeds have had which would alter the general partners' 50% interests.

DONE AND ORDERED at Miami, Florida, this 24 day
of March, 1987.

/s/ C. Clyde Atkins
C. CLYDE ATKINS
United States District Judge

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[Court Appendix I and II Omitted in Printing]

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-0848-Civ-Ryskamp

(Bankruptcy Cases No.
84-01590-BKC-TCB and
84-01594-BKC-TCB)

HOLYWELL CORPORATION, and
THEODORE B. GOULD,

Debtors/Appellants,

v.

THE BANK OF NEW YORK,
and FRED STANTON SMITH,
as Liquidating Trustee,

Appellees.

On Appeal from the
United States Bankruptcy Court
for the Southern District of Florida

ANSWER BRIEF OF APPELLEE,
THE BANK OF NEW YORK

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JURISDICTION

This Court has jurisdiction over appeals from orders of the Bankruptcy Court under 28 U.S.C. §158 and Bankruptcy Rule 8001 *et seq.* However, as set forth in Section II of this brief, the Court should decline to exercise jurisdiction over the subject matter of this particular appeal on grounds of mootness. The funds in controversy below have been paid or otherwise irrevocably applied in accordance with the terms of a plan of reorganization proposed by appellee, The Bank of New York (the "Bank"), duly confirmed on August 8, 1985 by the Bankruptcy Court. The Confirmation Order was subsequently affirmed by the United States District Court on March 20, 1986.¹ The appellants did not post a supersedeas bond (as required by the District Court) in order to stay the consummation of the plan, and it has now been substantially consummated. Mr. Gould himself, who is one of the appellants here and was also sole shareholder of the other appellant, stated in open court on June 9, 1986, that, "this plan has obviously been substantially consummated."²

Thus, the relief sought by the appellants would dismember a plan of reorganization that has been confirmed, affirmed, and substantially consummated, and that has not been stayed. That relief is neither fair nor possible, and accordingly this appeal should be dismissed as moot. *In re Matos*, 790 F.2d 864 (11th Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); 11 U.S.C. §1101(2).

¹*Holywell Corp., et al, v. The Bank of New York*, Case No. 85-3225-Civ-Aronovitz.

²Court Paper Number 1314, page 73; excerpt attached as Bank's App. 1. "Bank's App. ____" is a reference, by tab number, to the record excerpts attached to this brief.

STATEMENT OF THE ISSUES

- I. Was the Bankruptcy Court's Order of January 28, 1986 "Clearly Erroneous"?
- II. Is This Appeal Moot?

STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are to be affirmed unless "clearly erroneous". Bankruptcy Rule 8013. To the extent that the Bankruptcy Court's findings were affirmed by District Judge Aronovitz's Order affirming confirmation of the Plan [Dbt. App. 387],³ the clearly erroneous standard must be given "strict application". *In re Garfinkle*, 672 F.2d 1340, 1344 (11th Cir. 1982).

STATEMENT OF THE CASE

The appellants are two of five related debtors in the Chapter 11 bankruptcy proceedings below. Debtor Theodore B. Gould ("Gould") owned 100% of the stock of Debtor Holywell Corporation ("Holywell"), and also served as President and a director of Holywell. In turn, Holywell owned 100% of the stock of Debtor Miami Center Corporation ("MCC"); Gould served as President and a director of MCC as well. Gould and MCC were the sole general partners of Debtor Chopin Associates ("Chopin") and of Debtor Miami Center Limited Partnership ("MCLP"). All five Debtors were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami. The complex interrelationships among the Debtors and other affiliated entities are depicted on Bank's App. 2.

Debtor Holywell owned many subsidiaries other than Debtor MCC. One such non-debtor subsidiary, wholly-owned by Holywell, was Twin Development Corporation ("Twin"). Gould served as President and as a director of Twin as well.

³"Dbt. App. 387" is a reference to page 387 of the appendix to the debtor/appellants' brief.

The Bank was the construction lender for the Miami Center Project, and held a secured claim in the bankruptcies for over \$200 million. In an adversary proceeding to establish its lien, the Bank obtained a judgment for over \$234 million as of March 14, 1985, with interest accruing at over \$2 million per month thereafter [Bank's App. 3]. The Bank disputes the Debtors' chronology in their "Statement of the Facts" as to both accuracy and relevance. Since the focus of this appeal should be upon the rights of various parties of the \$13,163,490 realized by Twin from the sale of its Washington, D.C. office building, it is important to review carefully the record on that subject.

1. On June 23, 1983, Holywell pledged the stock of Twin (and other subsidiaries) to the Bank to secure Holywell's guaranty of the construction loans [Dbt. App. 258].

2. On February 1, 1984, Holywell and the other Debtors defaulted on the loan obligations, and the loans remained in default through the filing of the bankruptcy petitions on August 22, 1984 [C.P. No. 385h, pages 176-77].⁴ By virtue of the default and the terms of the stock pledge, the Bank had the right to exercise all rights of ownership over the Twin stock [Dbt. App. 272-77].

3. The money realized by Twin was part of the "Washington Proceeds" — approximately \$30 million in net proceeds received by the five debtors (the "Gould Group") from the sale of three properties in Washington, D.C. in December, 1984 and January, 1985. Until they filed the motion at issue here, Gould and Holywell always recognized and agreed that the Washington Proceeds would be used to pay allowed claims against the debtors:

⁴"C.P. No. ____" refers to the Bankruptcy Court Paper Number of a document in the Bankruptcy Court record below. "Adv. Pro. No. ____" indicates that a particular document was separately docketed in a designated adversary proceeding within the five bankruptcy cases.

(a) Gould and Holywell admitted their ability to control Twin and its assets by seeking Bankruptcy Court approval in October, 1984 for the sale of Twin's real estate [Dbt. App. 1]. In that motion, Gould and Holywell acknowledged that Bankruptcy Court approval of the sale of Twin's real estate was a condition precedent to the closing [Dbt. App. 3, Paragraph 4; Dbt. App. 64]. More significantly, Gould and Holywell represented to the Bankruptcy Court and to the hundreds of creditors (including the Bank) that:

6. Consummation of the transaction proposed herein is in the best interest of the Debtors and of the creditors in these proceedings in that the immediate cash infusion from such sale *which inures to Holywell and Gould* will provide the Debtors with capital much needed as an essential part of the reorganization sought in these proceedings. [Dbt. App. 3; emphasis supplied].

Thus, Holywell and Gould represented and admitted that Twin's share of the net proceeds of sale (ultimately \$13.1 million) was to be controlled and/or utilized by Holywell and Gould. If, as the appellants now argue, Twin was an independent entity, there would have been no reason or necessity for Gould and Holywell to have sought Bankruptcy Court approval for the sale of Twin's property.

(b) Based upon the representations by Gould and by Holywell that Twin's proceeds would be a "cash infusion" for the two Debtors, the Bank and other creditors did not oppose the sale, and all parties agreed that the sales proceeds should be (a) segregated and (b) subject to the jurisdiction of the Bankruptcy Court [Dbt. App. 68 to 71]. The Bankruptcy Court directed that:

1. Holywell shall cause Twin Development Corp. ("Twin"), a wholly owned subsidiary of Holywell, to deposit into a segregated account,

subject to further order of this Court, any net funds payable to Twin from the sale of certain improved real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended August 26, 1984, between Hadid Investment Group, Inc., as purchaser and Twin, 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Eleven Dupont Circle Associates and Dupont Land Associates as sellers (the "Purchase Agreement").

* * *

3. Holywell and Gould shall deposit all funds, including any beneficial interest, into a segregated account, subject to further order of this Court including any and all funds payable to or by Gould, Holywell or to any other entity or entities which are owned (wholly or partially) or controlled (wholly or partially) by Holywell and/or Gould as a result of the sale of the Washington Properties. The funds shall not include the proceeds payable to any independent person or entity in which neither Gould, Holywell, nor any related entity has any interest of any nature whatsoever. [Dbt. App. 68-70]

Neither Twin nor either of the appellants appealed that Order of December 16, 1984.

(c) Thereafter, the Bank moved for a determination that all such funds, *including* the Twin proceeds, were cash collateral subject to the Bank's lien [Bank's App. 4]. After a hearing, the Bankruptcy Court granted that motion [Dbt. App. 77 to 80]. Specifically, the Bankruptcy Court determined in an Order of December 31, 1984, that, "the net proceeds of the Washington sale constitute cash collateral as defined in §363 of the Bankruptcy Code" [Dbt. App. 79]. Once again, neither Twin nor either of the appellants took an appeal from the entry of that Order.

(d) Subsequently the Debtors filed Schedules and Statements of Affairs listing their respective assets and liabilities. Holywell admitted its 100% control over Twin, and the absence of any liabilities on the part of Twin, by scheduling Twin's value in the Holywell Schedules as \$13,210,000.00 — the amount of Washington Proceeds payable to Twin. [C.P. No. 275, Schedule B-2; Bank's App. 5].

(e) Thereafter, the Debtors promulgated separate (but similar) disclosure statements and plans of reorganization. The Holywell disclosure statement advised creditors that Twin's cash from the "Washington Proceeds" would be used to pay the claims of creditors [C.P. No. 466, page 4].

(f) Next, the Bank proposed a plan of reorganization and companion disclosure statement (the "Bank's Plan"). As amended, the Bank's Plan clearly disclosed that the "Washington Proceeds", including Twin's proceeds, would (1) become part of the Miami Center Liquidating Trust and (2) be used to pay Allowed Claims [Dbt. App. 96, 101-02, 115, 124-25]. The Bank's disclosure statement listed the exact amount of the Washington Proceeds, \$32,422,798.37, so it was unmistakeable that Twin's proceeds were included [Dbt. App. 96, 101]. The Bank reiterated that, "the Bankruptcy Court has determined that the Washington Proceeds are BNY's [the Bank's] cash collateral" [Dbt. App. 102]. Although the debtors and various related entities filed numerous objections to the Bank's Plan [C.P. No. 534, 545, 580, 849, 888a], *neither Twin nor either of the appellants ever objected* to the inclusion and use of Twin's proceeds as part of the Bank's Plan.

(g) Pursuant to the Bankruptcy Court's Orders, both the debtors and the Bank were required to file certificates relating to the voting by creditors and to the source of cash to fund their respective plans of reorganization. On May 13, 1985, counsel for the appellants certified that \$14,738,000 was available to fund the debtors' proposed plans, including

funds in the "Twin Development Trust Account" at Florida National Bank [C.P. No. 664; Bank's App. 6]. In so certifying, the debtors again evidenced their complete control over Twin's interests in the Washington Proceeds, and the clear understanding that such funds would be used — under both the debtors' and the Bank's proposed plans — to pay creditors.

(h) When the Bankruptcy Court confirmed the Bank's Plan [August 8, 1985, Dbt. App. 237], (1) Twin did not take an appeal and (2) the debtors never raised, as an issue on appeal, the disposition of Twin's \$13.1 million pursuant to the terms of the Bank's Plan. To the contrary, in their initial brief in the appeal from the Confirmation Order,⁵ the debtors stated as a fact that:

Holywell and Gould also had equity participations in limited partnerships that owned three office buildings in the District of Columbia and Virginia. The partnerships sold those office buildings for an aggregate price in excess of \$100,000,000. The sales were closed on December 31, 1984 and January 5, 1985. *Holywell and Gould* realized approximately \$32 million from these sales. [emphasis supplied].

Similarly, Twin and the appellants did not raise the argument that they now raise — that substantive consolidation was a "subterfuge" to take Twin's money — at the hearing on substantive consolidation on July 18, 1985 [Dbt. App. 417].

(i) Thereafter, neither Twin nor either of the appellants posted an appeal bond (as required by the District Court) in order to stay the implementation of the Bank's Plan. Accordingly, the Liquidating Trustee was appointed [Dbt. App. 241] and began to pay creditors with the funds in the Liquidating Trust. If Twin or the appellants truly intended

⁵Case No. 85-3225-Civ-Aronovitz; the initial brief is docket item number 13 in that case, and the quotation is from page 9 of the brief.

to prevent the use of *Twin's proceeds* to pay allowed claims as provided by the Bank's Plan, it was incumbent upon Twin and/or the appellants to post an appeal bond as required.

(j) On November 22, 1985, the Liquidating Trustee filed his first report, which clearly listed the Twin cash as an asset subject to disposition by the Liquidating Trustee [Dbt. App. 293, 300]. The Bankruptcy Court entered an Order approving the report on November 26, 1985 [Dbt. App. 301-03]. Neither Twin nor either of the appellants took an appeal from that Order.

(k) On December 30, 1985, the District Court remanded the Debtors' appeal from the Confirmation Order back to the Bankruptcy Court for the entry of more detailed findings of fact and conclusions of law [Dbt. App. 309]. Although invited and directed to raise any issue during the remand, the appellants never mentioned the Plan's utilization of Twin's proceeds. The Bankruptcy Court entered detailed findings and conclusions on January 29, 1986, as requested [Dbt. App. 329], reciting again that the Washington Proceeds of approximately \$30 million (which included Twin's share) were the Bank's cash collateral [Dbt. App. 344] and were to be used to pay creditors. The District Court affirmed those findings [Dbt. App. 387], noting specifically that the Bank's Plan utilized, "the proceeds of the sale by the debtors of certain real property owned by them in Washington, D.C. (\$32,000,000)" [Dbt. App. 396]. In their appeal to the Eleventh Circuit from that District Court Order,⁶ the debtors have not disputed that determination by the District Court.

(l) Nonetheless, the appellants asked the Bankruptcy Court to "clarify" that Twin's portion of the Washington Proceeds could not be used by the Liquidating Trustee to pay creditors [Dbt. App. 244]. When the Bankruptcy Court ruled against the appellants and they initiated this appeal, however, they did not obtain a stay pending the appeal.

⁶Case No. 86-5286, pending in the Eleventh Circuit.

Accordingly, the Liquidating Trustee has continued to use Twin's proceeds (as provided by the Bank's Plan) to pay creditors.

4. Twin never appeared separately in the bankruptcies below. In keeping with its membership in the Gould Group and its 100% ownership by debtor/appellant Holywell, Gould's and Holywell's lawyers always spoke on behalf of Gould and Holywell for Twin (as they continue to do in this appeal). Twin never filed objections to the Bank's Plan, and Gould (as President of Twin) controlled Twin's funds. Gould testified that Twin's funds *had* to be paid to Holywell:

Q. Twin Development Corporation?

A. It's a wholly-owned subsidiary of Holywell.

Q. What does it do?

A. It owned the general partnership in 1300 North 17th Street.

Q. That had something to do with the Washington property?

A. It is one of the buildings in the Washington area.

Q. If one of those subsidiaries had some money coming out of that closing, that would have gone to Holywell?

A. It *has to go to Holywell* as dividends.

[C.P. No. 385th, pages 49-50; emphasis supplied].

The foregoing facts, omitted from the appellants' "Statement of the Case", demonstrate that the appellants always understood and agreed that Twin's assets were under the control of the appellants and would be used to pay creditors under the debtors' plan *or* the Bank's Plan, whichever the Bankruptcy Court confirmed.

ARGUMENT

I. The Bankruptcy Court Ruled Correctly That Twin's Funds Were Part of The Liquidating Trust.

A. Substantive Consolidation.

The debtor/appellants argue that the Bankruptcy Court, "in effect sanctioned the substantive consolidation of Twin Development with the Debtors" [appellants' brief at 14]. That is not correct.

Substantive consolidation is an equitable doctrine, available under Section 105 of the Bankruptcy Code, under which, "the assets and liabilities of different entities may be consolidated and dealt with as if the assets were held by, and the liabilities were incurred by, a single entity". 5 *Collier on Bankruptcy* ¶1100.06[1] at 1100-32 (15th ed. 1985). The Bank's Plan provided for the substantive consolidation of the five debtors, but never purported to make Twin liable for the obligations of the debtors. Instead, the Bank's Plan did what the debtors' plans had proposed to do, and what the creditors themselves could have ultimately done in the absence of the bankruptcies — the Bank's Plan provided that Twin's share of the Washington Proceeds would be used to pay creditors.

The appellants have already attacked substantive consolidation on appeal, and have lost that appeal [Dbt. App. 399-404]. District Judge Aronovitz "studiously examined" that issue, and concluded that substantive consolidation, "was proper and correct as a matter of law and was based on sufficient factual findings which were not, themselves, clearly erroneous" [*Id.*]. That opinion characterizes the evidence in the record justifying substantive consolidation as "strong and convincing" [Dbt. App. 401]. The Order affirming substantive consolidation is "law of the case", and may not be attacked again by the debtor/appellants in the District Court. *Hildreth v. Union News Co.*, 315 F.2d 548,

550 (6th Cir. 1963); *Dade County Classroom Teachers' Ass'n. v. Rubin*, 238 So.2d 284, 289 (Fla. 1970), *cert. den.*, 400 U.S. 1009, 91 S.Ct. 569, 27 L.Ed.2d 623 (1971).

The debtor/appellants have noted in their brief that substantive consolidation is, "one of the issues on appeal to the Eleventh Circuit",⁷ so it is doubtful that this Court can even consider the issue.

Twin was not "substantively consolidated" with the debtors. Twin's obligation and liability to pay its share of the Washington Proceeds to Holywell — expressly and repeatedly admitted by the debtors — was a property right of Holywell's. When the Plan was consummated on October 10, 1985, the Liquidating Trustee acquired and utilized that property right.

The creditors of debtors Gould, Holywell, MCLP, and Chopin could have reached Twin's share of the Washington Proceeds. Under Section 620.63, Fla.Stat., Gould was personally liable to all creditors of MCLP and of Chopin, as well as to all of his own creditors.⁸ All such creditors — MCLP's, Chopin's, and Gould's — could have levied or executed upon his 100% ownership interest in Holywell. In turn, all of those creditors *and* all of Holywell's creditors could have levied or executed upon Holywell's 100% ownership interest in Twin, which included the \$13.1 million portion of the Washington Proceeds. Thus, the provisions of the Bank's Plan and the actions of the Liquidating Trustee were entirely consistent with Florida's creditors' rights law, and did not prejudice Twin. The appellants argue that the use of Twin's funds "would be grossly unfair to Twin's creditors and equity holders", but of course:

⁷Appellants' initial brief at page 15, note 7.

⁸Because Gould was a general partner of debtors MCLP and Chopin, which are both Florida partnerships.

(a) The appellants lack standing to complain about hypothetical or supposed injuries to creditors that are not before this Court. [Dbt. App. 406; *R.T. Vanderbilt Co. v. OSHA Rev. Comm.*, 708 F.2d 570, 574 (11th Cir. 1983)]; and

(b) The only "equity holder" of Twin is debtor/appellant Holywell, which has already taken and lost an appeal from the confirmation and operation of the Bank's Plan.

All of the "substantive consolidation" cases raised by the appellants were taken into account by District Judge Aronovitz in approving the confirmation of the Plan. A case-by-case analysis of the authorities cited by the appellants would serve no purpose here, because they are the same authorities that have been cited (a) by the debtors in their unsuccessful appeal from the order of substantive consolidation and from the Confirmation Order, (b) by District Judge Aronovitz in approving substantive consolidation and the other aspects of the Bank's Plan attacked by the debtors, and (c) by the debtors in their further appeal from Judge Aronovitz's Order to the Eleventh Circuit. In addition, the Plan's use of Twin's portion of the Washington Proceeds did not amount to "substantive consolidation" as argued by the debtors. Twin's existence as a corporation, its other assets, and all of its liabilities were unaffected by the Plan. Only the funds that "had" to be dividended to Holywell⁹ and that were part of the Bank's cash collateral were affected by the Plan. That is far short of "substantive consolidation".

B. The Guarantees and Stock Pledge.

The appellants next argue that their own guarantees and Holywell's pledge of Twin's stock to the Bank, "did not mean [the Bank] could simply grab the Twin assets" [appellant's initial brief at 26].

⁹See the testimony of appellant Gould at page 12 of this brief.

The Bank did not "grab the Twin assets". Twin's share of the Washington Proceeds has been applied to pay the Gould Group's creditors, which is a result that the creditors could have obtained by execution against Gould and Holywell. The Bank's Plan did precisely what the debtors repeatedly proposed to do — it used the Washington Proceeds to pay the Gould Group's creditors. The cash collateral Order [Dbt. App. 77] brought Twin's portion of the Washington Proceeds under the jurisdiction of the Bankruptcy Court. If Twin had an objection to that result (which Twin plainly did not, since it was controlled by Holywell and Gould and neither appealed the Order), it was required to file an appeal on or before January 10, 1985. Bankruptcy Rule 8002. Twin failed to do so, and thereby abandoned any right to dispute the Bankruptcy Court's jurisdiction over Twin's share of the Washington Proceeds or to claim that the debtors had no control over those funds.

II. This Appeal Is Moot.

In the absence of an order staying the implementation of a plan of reorganization or disposition of property, an appeal becomes moot. *In re Cada Investments, Inc.*, 664 F.2d 1158, 1160 (9th Cir. 1981). The same is true with respect to an unstayed appeal from a plan that has been substantially consummated. *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981).¹⁰ The Bank's Plan has been substantially consummated as defined by 11 U.S.C. §1101(2), as specifically determined by the Bankruptcy Court [Dbt. App. 367-68, Paragraph 57], and as admitted in open court by appellant Gould himself [Bank's App. 1]. There is simply no way that the Liquidating Trustee can identify Twin's portion of the Washington Proceeds or reclaim it from the creditors who

¹⁰See also *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986). That opinion notes that the failure to obtain a stay is fatal, "to the extent reversal of the confirmation order would require the invalidation of good faith transfers." *Id.* at 1147.

were paid over the past year (consummation of the Plan began over a year ago, on October 10, 1985). Nor can Twin simply recover its \$13 million and walk away into the sunset, as the appellants apparently hope and urge.¹¹ The use of that money by the debtors was a material aspect of the Bank's Plan. The Bank would not have (a) released its lien over that cash and the balance of the Bank's cash collateral, (b) waived the default interest differential on its construction loans to the debtors (several million dollars), or (c) bought the Miami Center Project for \$255.6 million, including approximately \$14 million of *new* cash, if Twin's funds had been unavailable as a matter of law for the payment of other creditors. Since the sale closed on October 10, 1985 and Twin's portion of the Washington Proceeds was turned over to the Liquidating Trustee as of that date pursuant to the terms of the Plan and of that sale, it is now too late to unwind the transaction. *In re Matos*, 790 F.2d 864 (11th Cir. 1986); *In re Sewanee Land, Coal & Cattle Co., Inc.*, 735 F.2d 1294 (11th Cir. 1984).

Mootness is jurisdictional, and this appeal should be dismissed on that basis. *Locke v. Board of Public Instruction of Palm Beach County*, 499 F.2d 359, 363-64 (5th Cir. 1974).

CONCLUSION

Having lost a direct attack on the Bank's Plan in this Court [Dbt. App. 387], the debtors are now attempting to raise an argument on behalf of one of their many wholly-owned and totally-controlled subsidiaries (Bank's App. 2). For their own purposes, the debtors repeatedly represented that Twin's share of the Washington Proceeds were available to Holywell and for the payment of the Gould Group's creditors. In seeking permission to sell the Washington, D.C. properties

¹¹Such a result would allow over \$13 million to leave the five estates out a "side door" before all creditors were paid and the five cases closed. Because of Gould's direct and complete control over Twin, he would in effect receive the \$13 million as an equity distribution before payment of all creditors.

that generated Twin's cash, the appellants told the Bankruptcy Court that "the immediate cash infusion" would inure to their benefit and would be "an essential part of the reorganization" [Dbt. App. 3].

Now the appellants want to argue that Twin was outside the sphere of the bankruptcies, and that the Bankruptcy Court and the Bank's Plan could not deal with Twin's share of the Washington Proceeds, even though those funds "had" to be paid to Holywell [see Mr. Gould's testimony at page 12 of this brief].

The Bankruptcy Court correctly rejected that transparent change in position by the debtors. Moreover, District Judge Aronovitz has already heard and rejected the appellants' objections to the Bank's Plan; this appeal is merely another bite at the apple. Accordingly, it is respectfully submitted that this Court should dismiss this appeal as moot or, in the alternative, affirm the Bankruptcy Court's Order below.

Respectfully submitted,

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By /s/ [illegible], for
Vance E. Salter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Dismiss Appeals as Moot was furnished by overnight courier this 7th day of November, 1986 to Fred H. Kent, Jr., Esq., Kent, Watts & Durden, 1400 Florida National Bank Tower, 225 Water Street, Jacksonville, Florida 32202, and Raymond Bergan, Esq., Williams & Connolly, 839 Seventeenth Street N.W., Washington, D.C., 20006, as attorneys for appellants; and by messenger to Irving M. Wolff, Esq., Holland & Knight, 1200 Brickell Avenue, Miami, Florida 33131, as attorney for the Liquidating Trustee.

/s/ [illegible], for

Vance E. Salter

**INDEX TO APPENDIX TO ANSWER BRIEF
OF APPELLEE, THE BANK OF NEW YORK**

1. Debtor/Appellant Theodore B. Gould's Testimony on June 9, 1986 (Bankruptcy Court; Court Paper No. 1314).
2. Organizational Chart of the Gould Group.
3. Judgment Determining Amount, Validity, and Extent of Liens of The Bank of New York (Bankruptcy Court; March 20, 1985; Court Paper No. 21 in Adv. Pro. 85-0160-BKC-TCB-A).
4. The Bank of New York's Emergency Motion to Treat Proceeds of The Sale of Certain Real and Personal Property as Cash Collateral, to Segregate and Account for Cash Collateral. (Bankruptcy Court; December 13, 1984; Court Paper No. 259).
5. Excerpt B-2 from Holywell Corporation Schedule. (Court Paper No. 275).
6. Certificate from the Debtor's Report on Amounts to be Deposited Before Confirmation (Bankruptcy Court; May 13, 1985; Court Paper No. 664).

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Thomas C. Britton

No. 84-01590

In the Matter

of

HOLYWELL CORPORATION, ET AL.,

Debtors.

(EXCERPTS)

**MOTION TO APPROVE SETTLEMENT OF
CONTROVERSY WITH HC YU & ASSOCIATES, INC.,
JOINT MOTION FOR ORDER CONFIRMING
CONTINUED EFFECTIVENESS OF THIS COURT'S
ORDER OF NOVEMBER 13, 1984,
DEBTOR'S OBJECTIONS TO LIQUIDATING
TRUSTEE'S SECOND REPORT,
EMERGENCY MOTION FOR ORDER AUTHORIZING
PAYMENT OF MAY PAYROLL AND OPERATING
EXPENSES FOR HOLYWELL CORPORATION.**

June 9, 1986

The above-entitled cause came on for Hearing before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, Room 1406, 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court commencing at 9:30 o'clock a.m. on Monday, June 9, 1986, and the following proceedings were had:

Reported By: Janice Mauldin

MR. WOLFF: There is one more order, did the Judge rule on that, made by the Holywell Hotel, people?

MS. COX: Well, I submitted the proposed order to you and to Mr. Ziegler.

THE COURT: But I haven't seen it, it is not on my calendar.

MS. COX: It is not, your Honor. I wanted them to review it first—

MR. ZIEGLER: We will review it when we get back to our offices.

MR. WOLFF: When you do submit it—

MR. SALTER: So that I understand your ruling, your Honor—

THE COURT: All right, look, you have been very patient with me and I am grateful to you. I am sorry to be as blunt and plain as I have been. Thank you for your courtesy and let's see if we can't bring this show to an end.

MR. GOULD: May I make a statement, please?

THE COURT: Yes, Mr. Gould.

MR. GOULD: I am the rubber ball that is being bounced around this court. You issued an order on April 29th directing the liquidating trustee to close this bankruptcy here, this chapter proceeding. On May 20th, as I recall, you issued another order dismissing or denying the motion that requested an extension of the Chapter 11 proceedings, and there is nobody in this court who wants this hearing to end immediately more than I do.

I would like you, now that Mr. Wolff has indicated that it is possible to reconcile the accounting process between Arthur Andersen and Mr. Schumacher, to place a deadline on the issuance of a final accounting and the preparation of a final decree which be done in participation with Mr. Kent, and I would like that deadline to be the end of this month, June 30th.

I see no reason, since this plan has obviously been substantially consummated, for its continuance, nor do I see

any reason for my having to absorb the legal expenses associated with the liquidating trustee's attorney and with my own attorneys' having to march in here and make statements to you about details that should have been resolved by accountants prior to any meeting at all.

Now, I would like you to consider the possibility of modifying the May 20th order and your April 29th order and placing a deadline on the

* * *

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

CASE NOS. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

ADV. NO. 85-0160-BKC-TCB-A

IN RE:

HOLYWELL CORPORATION, et al.,

Debtors.

THE BANK OF NEW YORK,
a New York banking corporation,

Plaintiff,

vs.

THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership, and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and as general partner of MIAMI CENTER LIMITED PARTNERSHIP; and HOLYWELL CORPORATION, a Delaware corporation,

Defendants.

JUDGMENT DETERMINING AMOUNT,
VALIDITY, AND EXTENT OF LIENS
OF THE BANK OF NEW YORK

THIS CAUSE came to be heard on March 14, 1985 upon the Complaint of The Bank of New York (the "Bank") to

determine the amount, validity, and extent of the Bank's mortgage liens. Having reviewed the pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§157(B) (2) (K) and 1334, and has jurisdiction over the parties.

2. The Bank is a New York banking corporation located in New York, New York, and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

3. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, a Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

4. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

5. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code on August 22, 1984.

6. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements and personal property on the real estate located in Miami, Dade County, Florida ("Miami Center Phase I"), as described in the loan documents attached to the Bank's Complaint in this action.

7. The due execution, delivery, recording, and authenticity of the notes, mortgages, and other loan documents is not in dispute.

8. The Bank advanced to the Debtors under the terms of the notes and mortgages the sum of \$196,711,481.58, all of which is secured by the mortgages.

9. The Bank notified the Debtors by letter that the loans were in default at all times after January 31, 1984.

10. Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is \$33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at \$64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

11. Additional accrued interest on the loans, determined by the Bank, commenced February 1, 1984. That additional default interest of \$4,528,077.11 is payable to March 14, 1985, and is secured by the loan documents. Based on a prime rate of 10.5% such default interest will accrue in the additional amount of \$11,148.50 per day under the loan documents for each day from March 14, 1985 (for a total daily sum of \$75,320.16). Any change in the prime rate (whether up or down) will affect that daily interest figure.

12. The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses, totalling \$831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

13. The lien of The Bank of New York in and to the Debtors' real and personal property identified in the loan documents as against the Debtors is superior to any other claim or interest of the Debtors in and to said real and personal property.

14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

15. The Court finds and decides that the total lien of the Bank (including default interest from February 1, 1984) is \$234,342,742.93 to March 14, 1985, plus per diem interest from March 14, 1985, at the rate of \$75,320.16 per day.

16. This Final Judgment is subject to the Court's Order, dated March 20, 1985, respecting the scope of the 1983 and 1984 releases executed by the Debtors.

DONE and ORDERED in Chambers at Miami, Florida, this 20th day of March, 1985.

/s/ Thomas C. Britton
UNITED STATES
BANKRUPTCY JUDGE

cc: S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Cases Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings in Chapter 11

IN RE:

HOLYWELL CORPORATION, et al.,

Debtors.

**EMERGENCY MOTION TO TREAT PROCEEDS
OF THE SALE OF CERTAIN REAL AND PERSONAL
PROPERTY AS CASH COLLATERAL, TO SEGREGATE
AND ACCOUNT FOR CASH COLLATERAL**

The Bank of New York ("BNY"), a secured creditor moves this Court, pursuant to Bankruptcy Code §363 and Bankruptcy Rules 4001 and 9014, for an order to compel the debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Reminc Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle") and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") cash collateral and to segregate and account for cash collateral on the following grounds:

1. (a) BNY, a construction lender, from time to time since March 27, 1980 has made loans (the "Construction Loans") to Miami Center Limited Partnership ("MCLP") and

Chopin Associates ("Chopin") in connection with the construction of the Miami Center Phase 1 project ("Phase 1"). The loan agreements entered into in March 1980 contemplated \$112,500,000 in loans to finance land acquisition and construction of Phase 1. Due primarily to delays and hard and soft cost overruns the total costs far exceeded the original estimates. BNY, at the request of MCLP and Chopin, made additional loans. The unpaid principal amount of the Construction Loans to Chopin and MCLP, together with certain overdraft indebtedness, amounts to \$196,711,481.58, plus unpaid and accrued thereon since December 1, 1983.

The Construction Loans, overdraft indebtedness and accrued and unpaid interest are guaranteed by guarantees of payment given to BNY by, among others, Holywell Corporation ("Holywell") (the "Guarantees"); and are secured, *inter alia*, by mortgages on Phase I; by an assignment of and security interest in all right, title and interest of Theodore B. Gould ("Gould") (or any entity in which Gould has or obtains an interest) to distributions as a general and/or limited partner from 1300, 1616 and Dupont Circle; by an assignment of all right, title and interest of Holywell (including, without limitation, any interest obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any other sums due or to become due to Holywell as a general and/or limited partner from 1300, 1616, Dupont Land and Dupont Circle; by a pledge of 100% of the issued and outstanding stock of Holywell; by a pledge of the stock of certain of Holywell's wholly owned subsidiaries, including without limitation, 100% of the issued and outstanding stock of TDC, 100% of the issued and outstanding stock of Orion Industries, Inc. ("Orion"), 100% of the issued and outstanding stock of HWL Corporation ("HWL") and 100% of the issued and outstanding stock of Parkwell, Inc. ("Parkwell").

(b) On or about October 14, 1983 BNY made a loan to Holywell in the principal amount of \$1,750,000 (the "Holywell Loan"), which Holywell Loan is evidenced by a Note, dated October 14, 1983, given by Holywell to BNY (the "Holywell Note"). The purpose of the Holywell Loan was to enable Holywell and Gould to settle a lawsuit brought by Clark Enterprises, Inc. ("Clark") a former shareholder of Holywell and to enable Gould to acquire the Holywell stock owned by Clark. As a result of the settlement, Gould became the owner of 100% of the issued and outstanding stock of Holywell. The unpaid principal amount of the Holywell Loan is \$1,750,000 and interest is accrued and unpaid thereon since October 14, 1983. The payment of all principal and interest on the Holywell Loan is guaranteed by Gould pursuant to a guarantee of payment dated October 14, 1983 (the "Gould Guarantee"). The Gould Guarantee is secured, *inter alia*, by an assignment of and security interest in all right, title and interest of Gould (or any entity in which Gould has or obtains an interest) to distributions as a general and/or limited partner of 1300, 1616 and Dupont Circle which assignment and security interest is superior to those described in (a) above. Holywell, as security for its obligations under the Holywell Note, assigned to BNY all of its right, title and interest (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due or to become due to Holywell as a general and/or limited partner of 1300, 1616, Dupont Circle and Dupont Land.

2. On August 22, 1984 Holywell, Gould, MCLP, Chopin and Miami Center Corporation ("MCC") each filed a petition for reorganization under Chapter 11, Section 301 of the Bankruptcy Code (the "Code"). The within Chapter 11 cases are being jointly administered pursuant to Order of this Court.

3. On October 22, 1984 this Court granted the motion of Holywell and Gould as partners and stockholders in TDC,

1300, 1616, Dupont Circle and Dupont Land for an order authorizing and approving the sale of the Washington Properties pursuant to the Purchase Agreement. Paragraph 3 of the Order reads as follows:

"Holywell and Gould, be and they hereby are, directed to segregate the share of net proceeds due Holywell and Gould from the sale of the real and personal property approved by this Order and to invest such proceeds in accordance with Section 345 of the Bankruptcy Code and hold same subject to further order of this Court."

By Order dated on or about December 10, 1984 Gould and Holywell were to cause all funds received by related entities in connection with the sale of the Washington Properties to be deposited in a segregated account. Paragraph 4 of that Order reads as follows:

"Holywell and Gould shall cause all net funds payable into such segregated account pursuant to Paragraphs 1, 2 and 3 above to be invested in accordance with Section 345 of the Bankruptcy Code subject to any claim of lien by Bank of New York and subject to further order of this Court. The interest on such funds may be used with prior approval of this Court for operation of Miami Center subject to the prior orders of the court in regard to use of income. However, the transfer and use shall not prejudice any security, lien or future claim by any creditor."

4. BNY, by reason of the following agreements, has a validly perfected first security interest in (i) any distributions to Gould (or any entity in which Gould has or obtains an interest) as a general and/or limited partner in 1300, 1616 and Dupont Circle, and (ii) all right, title and interest of Holywell (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to

distributions, sales proceeds, and any other monies due or to become due to Holywell as a general and/or limited partner in 1300, 1616, Dupont Land and Dupont Circle:

(a) Hypothecation and Security Agreement dated May 14, 1981, by and between Gould, MCLP, and BNY, as amended, whereby Gould hypothecated to MCLP, and MCLP, as security for the Construction Loans, pledged to the Bank, *inter alia*, all right title and interest of Gould (or any entity in which Gould has or obtains an interest) to distributions, as a general and/or limited partner from 1300, 1616 and Dupont Circle. (Gould's interests in 1333 New Hampshire Associates was also hypothecated and pledged but this partnership's property has since been sold). A copy of the Hypothecation and Security Agreement dated May 14, 1981 and all amendments and modifications thereto are annexed hereto and marked as Exhibit "A". BNY's interest in the distributions from 1300, 1616 and Dupont Circle to Gould and the Gould related entities was perfected by the filing of UCC-1 Financing Statements, naming Gould as debtor, in the Circuit Court Clerk's Office, Albemarle County, Virginia on May 26, 1981, file number 10,629, and in the office of the Secretary of State of the Commonwealth of Virginia on May 27, 1981, file number 810513876.

(b) Assignment and Security Agreement, dated June 23, 1983, by Holywell to BNY whereby Holywell, as collateral security for Holywell's obligations under the Guarantees, assigned to BNY and granted BNY a first priority security interest in, *inter alia*, all right title and interest of Holywell (including, without limitation any interest obtained as a result of any assignment or beneficial

assignment) to distributions, sales proceeds and any and all monies due and/or to become due to Holywell as a general or limited partner of 1300, 1616, Dupont Circle, and Dupont Land. A copy of the Assignment and Security Agreement dated June 23, 1983 is attached hereto and marked as Exhibit "B". BNY's security interest in the distributions and sales proceeds from 1300, 1616, Dupont Circle and Dupont Land was perfected by the filing of UCC-1 Financing Statements naming Holywell as debtor, in the Circuit Court Clerk's Office, Arlington County, Virginia on October 25, 1983, file numbers 32229, 32230 and 32231 and in the real property records in Washington, D.C. on December 1, 1983, file number 39026.

(c) Amendment No. 1 dated October 14, 1983 to the Assignment and Security Agreement dated June 23, 1983 by Holywell to BNY whereby BNY was granted, as security for the repayment of the Holywell Loan, an assignment of all right, title and interest of Holywell (including, without limitation, interests obtained as a result of any assignment or beneficial assignment) to distributions, sales proceeds and any and all other monies due and to become due to Holywell as a general and/or limited partner in 1300, 1616, Dupont Land and Dupont Circle. A copy of Amendment No. 1 is attached hereto and marked as Exhibit "C". BNY's security interest in the distributions and sales proceeds from 1300, 1616, Dupont Land and Dupont Circle was perfected by the filing of financing statements in the Clerk's Office in Arlington County, Virginia on October 25, 1983, file numbers 32229, 32230 and 32231, and in the real property records in Washington D.C. on December 1, 1983, file number 39026.

(d) Assignment and Security Agreement, dated October 14, 1983, by Gould to BNY whereby Gould, to secure the Gould Guarantee, granted BNY an assignment of any security interest in all collateral set forth in the Hypothecation and Security Agreement dated May 14, 1981, as amended, referred to in (a) above, by and between Gould and MCLP and BNY. A copy of the Assignment and Security Agreement dated October 14, 1983 is attached hereto and marked as Exhibit "D".

5. Based on an analysis of the limited partnership agreement for 1300, 1616, Dupont Circle and Dupont Land and based on the information set forth in a letter dated December, 1983 from Gould to BNY,* confirming Gould's and Holywell's interests in the partnerships which own the Washington Properties (a copy of said letter is attached hereto and marked as Exhibit "E") Gould's and Holywell's ownership interests in 1300, 1616, Dupont Circle and Dupont Land are as follows:

- | | |
|-------------------|-----------|
| (a) 1300 | — 69.342% |
| (b) 1616 | — 45.90% |
| (c) Dupont Circle | — 31.37% |
| (d) Dupont Land | — 31.37% |

An explanation of the computation of Gould's and Holywell's ownership interests in the aforementioned limited partnerships is set forth in the attached Schedule "1".

*Note that the percentage of Gould's total direct and indirect general and limited partnership interests differs from the percentages set forth in the letter attached hereto and marked as Exhibit "E". Based upon information available to BNY it appears that Gould's and Holywell's ownership interests in 1300, 1616, Dupont Circle and Dupont Land were accurately set forth in the letter, however the computation of Gould's and Holywell's percentage interests in the partnerships as set forth in the letter is obviously erroneous.

6. The distributions to Gould and Holywell from the partnerships set forth above are clearly "cash collateral" as defined by Code §363(a) since BNY has a perfected first security interest as collateral for the Holywell Loan and a perfected second security interest for the Construction Loans in the distributions made or to be made to Gould and Holywell (or any entity in which Gould has or obtains an interest) under state law, and such a security interest in post-petition proceeds is authorized by Code §552(b).

7. The cash collateral forms (i) a part of the security granted to BNY in connection with the Construction Loans and the overdraft indebtedness, in the aggregate principal amount of \$196,711,481.58, accrued and unpaid interest thereon, and (ii) the only security to BNY in connection with the Holywell Loan together with the accrued and unpaid interest thereon.

8. In summary, as set forth above and in its Memorandum of Law, BNY respectfully requests that all distributions flowing to Gould and Holywell and its related entities as set forth above be deemed "cash collateral" to be held in the segregated account referred to in Paragraph 3 above subject to the continuing security interest in favor of BNY, and that Gould, Holywell and the related entities be directed to account for said cash collateral.

WHEREFORE, BNY respectfully requests that this Court issue an Order granting the relief requested herein together with such other and further relief as this Court deems just and proper:

DATED this 13 day of December, 1984.

Emmet, Marvin & Martin
48 Wall Street
New York, New York 10005
(212) 422-2974

S. Harvey Ziegler, Esq.
Meyer Weiss Rose Arkin
Shampanier Ziegler & Barash
405 Lincoln Road
Miami Beach, Florida 33139

and

Steel Hector & Davis
4000 Southeast Financial Center
Miami, Florida 33131
(305) 577-2800

By: /s/ F. L. Carter

FRANCIS L. CARTER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing
Emergency Motion to Treat Proceeds Of The Sale Of Certain
Real and Personal Property As Cash Collateral, To Segregate
And Account For Cash Collateral was mailed this 13 day of
December, 1984 to all parties on the attached list.

By: /s/ F. L. Carter

FRANCIS L. CARTER

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-01590-BKC-TCB

re HOLYWELL CORPORATION

Schedule A - STATEMENT OF ALL LIABILITIES OF DEBTOR

Debtor (or firms) have all claims including trade claims owed by Debtor within the last 6 years.

Social Security No

and Debtor's Employer's Tax Identification No 52-1070235

Schedules A-1, A-2, and A-3 must include all the claims against the debtor or his property as of the date of the filing of the petition by or against him

SCHEDULE A-1 - CREDITORS HAVING PRIORITY

Class of Claim	Name of Creditor and address (including mailing address)	Amount or percentage of assets of debtor to which claim is entitled as of the date of the filing of the petition, or other date specified by the court	Amount or percentage of assets of debtor to which claim is entitled as of the date of the filing of the petition, or other date specified by the court	Amount or percentage of assets of debtor to which claim is entitled as of the date of the filing of the petition, or other date specified by the court
	(SEE ATTACHED SCHEDULE)	Employment 8/1 - 8/22/84 (16 work days)	Paid 9/1/84	31.7
		*Pursuant to Bankruptcy Court Order dated 8/24/84	*	
	None			
	None			
	1) Internal Revenue Service Appeals Office 432 Universal N. Bldg 1875 Connecticut Avenue Washington, DC 20009	7/31/80 - Corporate Income Tax 7/31/81, 7/31/82, 7/31/83, 7/31/84 Corporate Income Tax Adj's	Disputed Contingent & Unliquidated	489,063 00 Unknown
	Internal Revenue Service Memphis Service Center 3131 Democrat Road Memphis, TN 38110	8/03/84 - Federal Withholding and Fica Deposit - 3rd Qtr.		13,028 41
	2) D.C. Treasurer Accounts Receivable Sec. 300 Indiana Ave., N.W. Washington, DC 20001	10/15/83 - Franchise Tax	Unliquidated	4,650 00
	Same as Above	7/31/84 - Franchise Tax	Contingent & Unliquidated	Unknown
	3) Tax Collector PO Box 520410 Miami, Fl. 33152	1/1/83 - 1983 Personal Property Tax		3,453.97
			Total	542,137 48

SEE SCHEDULE A-1

SEE SCHEDULE A-1

ABLE COPY

SCHEDULE B-2

t) Stocks and interests in incorporated and unincorporated companies:

	<u>Ownership</u> <u>%</u>	<u>Market Value</u>
Parkwell, Inc.	100 %	\$ 750,000
Twin Development Corporation	100	13,210,000
Charleston Center Corporation	100	- 0 -
Whitehall Security Corporation - W	100	572,000
Holywell Leasing Company	100	100,000
PBA, Inc.	100	100
Miami Center Corporation	100	20,630,000
Holywell Management of Wash., Inc.	100	1,913,000
Holywell Construction Company	100	100
Orion Mechanical Services, Inc.	100	343,000
Studley - Holywell Associates, Inc.	50	100
NHA Corporation	66.6	17,000
Whitehall Building Services, Inc.	100	95,000
Parkwell of Florida, Inc.	100	100,000
Orion Engineering of Florida, Inc.	100	37,000
Holywell Telecommunications, Inc.	100	1,000,000
Holywell Hotels, Inc.	100	100
Holywell Management of Florida, Inc.	100	160,000
Holywell Insurance Services, Inc.	100	100
Whitehall Security Corporation - FL	100	360,000
Orion Cleaning Services of Wash., Inc.	100	719,000
		<u>\$40,006,500</u>

Synopsis of money to be deposited for confirmation pursuant to Miami Center Limited Partnership's plan:

<u>CLASS</u>	<u>AMOUNT NEEDED FOR CONFIRMATION</u>
1	\$4,320,479.75
2	\$ 501,805.41
3	\$ 116,407.98
4	\$2,341,000.00
6	\$ 127,358.44
9	\$1,863,709.60
10	\$ 55,772.06
11	\$ 56,274.78
12	\$2,034,852.69

TOTAL: \$11,417,690.91

I hereby certify that \$14,738,000.00 has been deposited in Kent, Watts & Durden's Trust Accounts in the Florida National Bank at Miami, subject to the Order of this Court. This amount shall be made available upon confirmation and release by the Court for the payment of claims set out above. The Trust Accounts in which these funds are deposited are:

KENT, WATTS & DURDEN — Theodore B. Gould
Trust Account
Account # 0003192139

KENT, WATTS & DURDEN — Holywell
Corporation Trust Account
Account # 0003192161

KENT, WATTS & DURDEN — Twin Development
Trust Account
Account # 0003168126

DATED: May 13, 1985

KENT, WATTS & DURDEN

/s/ FRED H. KENT, JR.

Fred H. Kent, Jr.

Robert C. Nichols

850 Edward Ball Building

Post Office Box 4700

Jacksonville, Florida 32201

(Attorneys for

Debtor/Disbursing Agent)

APPENDIX L

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

PROCEEDINGS IN CHAPTER 11

Case No: 84-01590-BKC-TCB

Case No: 84-01591-BKC-TCB

Case No: 84-01592-BKC-TCB

Case No: 84-01593-BKC-TCB

Case No: 84-01594-BKC-TCB

IN RE:

MIAMI CENTER CORPORATION,

Debtor.

1200 Brickell Avenue,
Miami, Florida
Monday, 9:48 a.m.,
February 11, 1985.

D E P O S I T I O N

of

THEODORE B. GOULD

taken on behalf of the Committee of Unsecured
Creditors of Miami Center Limited Partnership
pursuant to Bankruptcy Rules 2004 and 9016

* * *

A. That's right. Prior to the filing, we could not disperse funds without the approval of the Bank of New York. The Bank of New York specifically prevented us from paying the IRS.

Q. Has Miami Center Limited Partnership taken down all of the money in connection with the Bank of New York loan?

A. There may be a few thousand dollars that have not been taken down.

Q. Whitehall Pest Control, Inc.?

A. It performs the services at this project.

Q. What does it do?

A. It controls pests.

Q. This is one of the totally owned subsidiaries of Holywell?

A. Right.

Q. It is not listed as a creditor.

A. It is a service that is provided under the management contract.

Q. With whom?

A. With Holywell.

Q. Twin Development Corporation?

A. It's a wholly-owned subsidiary of Holywell.

Q. What does it do?

A. It owned the general partnership in 1300 North 17th Street.

Q. That had something to do with the Washington property?

A. It is one of the buildings in the Washington area.

Q. If one of those subsidiaries had some money coming out of that closing, that would have gone to Holywell?

A. It has to go to Holywell as dividends.

Q. It is part of that money that is in escrow?

A. It is not in escrow.

Q. It is.

A. It is in escrow?

Q. It is all in escrow. It better be.

MR. KENT: It has not been dividended to Holywell.

THE WITNESS: I didn't realize the court order was an escrow agreement.

BY MR. WOLFF:

Q. NHA Corporation?

A. NHA was a partially-owned subsidiary—I think it is two-thirds owned by Holywell Corporation, and it is a general partner of property that we owned in Washington, D.C. called 1333 New Hampshire Avenue.

NHA owned the land and had a general

* * *

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 85-3225-Civ-ARONOVITZ

Bk. Nos.: 85-01590-BKC-TCB
85-01591-BKC-TCB
85-01592-BKC-TCB
85-01593-BKC-TCB
85-01595-BKC-TCB

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES,
THEODORE B. GOULD,

Appellants/(Debtors),

vs.

BANK OF NEW YORK,

Appellee/(Principal Creditor).

ORDER OF REMAND AND DENIAL OF
MOTION TO DISMISS

This is an appeal from Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of Florida. Appellants (five) Chapter 11 debtors in the proceeding below, appeal from two orders of the bankruptcy judge:

- a.) an order approving the substantive consolidation of the debtors' estates; and,
- b.) the trial court's order confirming the plan of reorganization proposed by the Bank of New York, the major creditor of the debtors' estates and the appellee herein.

Both rulings are intertwined and interdependent. Also before the Court are two motions filed by the appellee and by the liquidating trustee appointed under the confirmed plan which seek to dismiss this appeal on the grounds of mootness.

The five debtors who initiated the Chapter 11 proceedings below and whose estates were consolidated by order of the Bankruptcy Judge, Thomas C. Britton are:

Miami Center Limited Partnership (hereinafter "MCLP"), which developed the Miami Center Project;

Chopin Associates, the owner of the land, leased to MCLP, upon which the facility was built;

Holywell Corporation, an entity involved in servicing and holding real property;

Miami Center Corporation, a subsidiary of Holywell Corporation; and,

Theodore B. Gould, the sole shareholder of Holywell Corporation, president of the Miami Center Corporation, and a general partner of both Chopin Associates and the Miami Center Limited Partnership.

The Bank of New York, the appellee, was the primary secured creditor of the debtors, having advanced over Two Hundred Million (\$200,000,000) Dollars in mortgage loans for the purchase and construction of the Miami Center Project.

Involved in these proceedings, among other assets of the debtors and the claims of various other creditors, is property known as the Miami Center, situated at a bay-front site in downtown Miami, Florida (roughly South of Bayfront Park). The Miami Center, the debtors' major asset, consists of a modern 35-story hotel (The Pavillon) and office building structure (Edward Ball Building) with two towers joined by

a restaurant and shopping complex known as the Podium. The hotel and office facilities were furnished with furniture, fixtures and equipment (FF&E) which were leased from some affiliated creditors of the debtors. Construction and management of the Miami Center was the responsibility of MCLP. (Four additional vacant lots [blocks] adjacent to the debtors' property are owned by the Miami Center Joint Venture, which is not a debtor in these proceedings. Thus, these four blocks were not included in the debtors' estates for purposes of reorganization.)

HISTORY OF THE CHAPTER 11 PROCEEDINGS

Due to substantial disagreements among the five debtors and the Bank of New York over the priority to be given to the latter's mortgage loans vis-a-vis subsequent financing arrangements made by the debtors, the Bank declared its mortgage loans secured by the Miami Center property to be in default in early 1984, and filed foreclosure proceeding against the property on July 27, 1984. All five debtors thereupon filed petitions under Chapter 11 of the Bankruptcy Code in the court below. Between the initial filing of those petitions on August 22, 1984 and the issuance of the court's final order of confirmation on August 8, 1985, Judge Britton considered and ruled upon a myriad of motions and other matters, as can be seen by the voluminous record before this Court on appeal. Appellants here challenge the bankruptcy court's rulings on two of the most significant of these rulings:

1. The July 23, 1985 Order Approving the Substantive Consolidation of the Debtors' Estates (Court Paper #840).¹

¹Substantive consolidation, in the context of a Chapter 11 proceeding, entails much more than the mere procedural consolidation contemplated by *Fed.R.Bankr.P.* 1015. As the advisory committee note to that rule explains, the substantive combination of the estates of various debtors is only sometimes appropriate, depending upon the factual circumstances of the case. Substantive consolidation has been defined as an equitable

2. The August 8, 1985. Final Order of Confirmation, confirming the plan of reorganization of the appellee Bank of New York (Court Paper #906).

The major components of the plan approved by the court below are as follows:

—The Bank would acquire the entire Miami Center Project Property, including the furniture, fixtures and equipment (FF&E) for the sum of Two Hundred Fifty-five Million, Six Hundred Thousand (\$255,600,000) Dollars. (This figure is based on a valuation of the property performed by Charles V. Failla & Associates and commissioned by the Bank of New York. Appellants contest the validity of this appraisal and the fact that the court below did not hold hearings thereon.) This acquisition would be funded through the net amount already owed to the appellee by the debtors—approximately Two Hundred Forty Million (\$240,000,000) Dollars—to which would be added Thirty Million (\$30,000,000) Dollars realized through the sale by debtors Holywell and Gould of certain unrelated, distinct real property in Washington, D.C. This latter sum of Thirty Million (\$30,000,000) Dollars has been held and maintained as additional collateral by the Bank in a separate collateral account. (See Judge Britton's Order of December 31, 1984. Court Paper #303.)

(Footnote No. 1 continued)

remedy in which "the assets or liability of different entitites are consolidated and dealt with as if the assets were held by, and the liabilities incurred by, a single entity." *Matter of Luth*, 28 B.R. 564, 566 (D. Idaho 1983), citing 5 Collier on Bankruptcy, p. 1100-32, (15th Ed. 1980).

—The liquidating trustee, to be appointed under the Plan, would have effective control over the operations of the Miami Center, ousting the debtors in possession. In addition, the trustee would be required by the terms of the Plan to voluntarily dismiss the civil suit filed by the debtor/appellants in this Court, Case No. 85-0228-Civ-Hoeveler, which sought damages against appellee for breaches of its loan agreements, violations of the federal RICO statute, and other actions.

—The Bank would set aside Fifteen Million (\$15,000,000) Dollars, backed by surety bonds, for two creditors who had leased the equipment and fixtures to the MCLP. (This ruling is under separate appeal by the Bank of New York in this Court before the Honorable C. Clyde Atkins who required this sum in the nature of a Supersedeas Bond.)

—The claims of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing Company, affiliated creditors who had leased the FF&E to the Miami Center owners, would be equitably subordinated to those of other creditors with lower priority on the ground these creditors were “insiders”.

—The Bank’s Plan further required the substantive consolidation of the estates of the five debtors/appellants. *See note 1, supra.*

The substance of the two orders appealed from by the debtors is discussed below. (In actuality the Order approving Plan of Reorganization includes inferentially the effect of the Order of Substantive Consolidation.) Attached to this opinion for reference is a copy of each of these Orders, as well as an excerpt from the transcript of the hearing on substantive consolidation held before Judge Britton on July 18, 1985, which can be deemed to supplement the judge’s two-page Order on Substantive Consolidation entered on July 23, 1985.

THE SCOPE OF REVIEW AND NECESSITY OF ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is settled beyond dispute that a district court, in deciding an appeal from a bankruptcy court's ruling, must accord substantial deference to the trial court's findings of fact, reversing these only when they are "clearly erroneous". *Matter of Missionary Baptist Foundation of America*, 712 F.2d 206,209 (5th Cir. 1983). Conclusions of law, however, are subject to plenary review by the district court. *Matter of Multiponics*, 622 F.2d 709, 713 (5th Cir. 1980). There is authority holding that, where the bankruptcy court's findings are inadequate (or altogether absent) for purposes of review, then the "clearly erroneous" standard can be discarded, leaving the trial court's entire determination of the case freely reviewable. *Watson v. Thompson*, 456 F.Supp. 432, 436 (S.D. Ga. 1978).

The requirement that a trial court, acting without a jury, make explicit findings of fact and conclusions of law serves several purposes. Not only does it aid the appellate court in clearly understanding the proceeding below and the basis for the trial court's ruling, but it ensures that trial courts engage in a carefully reasoned analysis of each case. *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 555 F.2d 426, 432 (5th Cir. 1977). The requirement that trial courts enter findings of fact and conclusions of law in appropriate cases has long been a part of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 52(a). Rule 52 is made applicable to certain proceedings in bankruptcy by *Fed.R.Bankr.P.* 7052,² which requires the bankruptcy court to enter findings of fact and

²Rule 7052 has not been affected by the Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353 (July 10, 1984), and is widely cited by courts in their most recent decisions in the bankruptcy area. *Briden v. Foley*, 776 F.2d 379 (1st Cir. 1985); *In Re Fossum*, 764 F.2d 520 (8th Cir. 1985); *Judson v. Levine*, 50 B.R. 587 (S.D. Fla. 1985).

conclusions of law in adversary proceedings. Hearings on substantive consolidation and confirmation at issue here were *adversary* proceedings as that term is defined in *Fed.R.Bankr.P.* 7001. These hearings below were "contested" matters as hereinafter defined. Also, under general procedural and/or substantive provisions applicable wherein the trial court is sitting in equity to review rulings by a bankruptcy judge in matters founded in equity, findings of fact and conclusions of law are required. The requirements of *Fed.R.Civ.P.* 52(a) are nonetheless applicable to the instant appeal.

Fed.R.Bankr.P. 9014 extends the application of Rule 7052 to "contested matters" and encompasses, (*See* Advisory Notes to Rule 9014), the debtors' objections to the trial court's order on substantive consolidation. The appellants' objection to the final order of confirmation is explicitly made subject to Rule 9014 by *Fed.R.Bankr.P.* 3020(b). Thus, the Bankruptcy Judge should have made and entered clear and concise findings of fact and conclusions of law to support the orders from which this appeal is taken. This was not done. Such findings and conclusions as exist are inadequate for purposes of review. Actually, findings and conclusions are almost non-existent or absent, and to such extent that in this case this Court does not consider that review by discarding the "clearly erroneous" standard and proceeding "*de novo*" should be undertaken.

THE GROUNDS OF THE DEBTOR'S APPEAL

In their appeal to this court, the appellants state the following substantive grounds for their appeal:

- 1.) that the equitable subordination of the claims of creditors Miami Center Joint Venture, Holywell Leasing Co. and Holywell Telecommunications Co. was error, both substantively (since their leases were determined to be "true leases", thus meriting

their treatment as outside creditors) and procedurally (since no hearing was held on the subject of equitable subordination).

- 2.) that the substantive consolidation of the estates of the five debtors was error, in that the Bank of New York failed to carry its burden of proving the necessity of such consolidation and because two of the five debtors were solvent at the time of the bankruptcy court's order.
- 3.) that the bankruptcy court's failure to hold a hearing on the validity of the valuation of the Miami Center project which the Bank of New York submitted was reversible error.
- 4.) that the bankruptcy court's action in upholding that portion of Bank's plan which directs the liquidating trustee to dismiss the debtors' pending civil suit against the appellee is unconstitutional in that it allows a non-Article III court to remove a case from the jurisdiction of this Court.
- 5.) that the Bank's plan, as confirmed by the bankruptcy court, unfairly discriminates against certain equally situated unsecured creditors by favoring one (i.e. Holywell Corporation) in violation of 11 U.S.C. 1129(b).
- 6.) that the approved plan wrongly subordinates the claims of certain mechanics and materialmen.
- 7.) that the bankruptcy court denied the debtors due process by refusing their requests for hearings on various amendments to the Bank's proposed plan of reorganization and for adequate disclosure by the Bank of such amendments.

As to each of these grounds, this Court has been left with the impeded, if not impossible, task of trying to apply a "clearly erroneous" standard of review to findings of fact that are either non-existent or too vague to support adequate review. As the Fifth Circuit noted in *Echols v. Sullivan*, 521 F.2d 206 (5th Cir. 1975), "findings that are nothing more than broad general statements, stripped of underlying analysis or justification shedding some light on the reasoning employed, makes it impossible for [an appellate court] to give meaningful review to the judgment." *Id.* at 207. For example, in his order approving the substantive consolidation of the debtors' estates, the bankruptcy judge supported his ruling with the following statement: "The Court finds that the legal relationships among the debtors and the facts in this record support the substantive consolidation of the estates. . . ." Order of July 23, 1985 (Court Paper #840). (See Appendix A.)

In the bankruptcy court's order confirming the Bank of New York's Plan of Reorganization, the lack of explicit findings is even more disturbing. The Bank's plan is the centerpiece of the entire Chapter 11 proceeding below, affecting, as it does, significant rights and interests of creditors and debtors alike. The plan consists of many complex provisions, some of which form the basis of this appeal. Yet, in his five page order approving this complicated plan which would determine the disposition of over Three Hundred Million (\$300,000,000) Dollars in assets, the bankruptcy court provided no more explanation of its decision to approve the plan than a statement that the plan "meets each of the requirements specified in 11 U.S.C. §1129(a) and (b)." Final Order of Confirmation, dated August 8, 1985 (Court Paper #906). In view of the important substantive rights which are inevitably affected by the Bank's plan, much more detailed treatment of both the legal reasoning and the underlying facts supporting these orders was required.

To support its order of substantive consolidation, for instance, the trial court would have had to find the existence

of certain, widely accepted factors which justify this extraordinary remedy which, if employed inappropriately, can result in unfair treatment of both debtors and creditors. *In Re Flora Mir*, 432 F.2d 1060 (2nd Cir. 1970). Those factors are set out in *In Re Donut Queen*, 41 B.R. 706, 709 (S.D.N.Y. 1984) and include the following:

1. The presence or absence of consolidated financial statements.
2. The unity of interests and ownership between the various corporate entities.
3. The existence of parent and intercorporate guarantees on loans.
4. The degree of difficulty in segregating and ascertaining individual assets and liabilities.
5. The commingling of assets without formal observance of corporate formalities.
6. The commingling of assets and business functions.
7. The profitability of consolidation at a single physical location.

In the same manner, a bankruptcy court, before it can justly order the equitable subordination of otherwise prior claims must first find that the following three tests are satisfied:

1. The claimant must have engaged in some type of inequitable conduct.
2. The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant.
3. Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.

Matter of Mobile Steel Co., 563 F.2d 692, 700 (5th Cir. 1977).

It is clear from the record on appeal that here the bankruptcy judge never made the findings of fact necessary to satisfy the requirements of the tests cited above for equitable subordination and substantive consolidation. The same lack of accessible findings prevents this court from adequately reviewing the remainder of the issues presented in this appeal. For this reason, this Court has no alternative but to remand the entire matter before it to the bankruptcy court. Faced with the same situation, (lack of adequate findings of fact on appeal from an order of equitable subordination), the Fifth Circuit Court in *Matter of Missionary Baptist Foundation of America, Inc.*, 712 F.2d 206 (5th Cir. 1983) remanded the matter to the bankruptcy court, explaining that "we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the [appellee] has discharged his burden of proof thereunder." *Id.* at 212.

The Court fully acknowledges that a trial judge, in ruling on a matter governed by the requirements of *Fed.R.Civ.P.* 52, is not held to any formalistic style in preserving his findings, such as numbered paragraphs. All that is required is that the factual and legal basis of every significant ruling be stated in a clear and understandable manner which permits the reviewing court to fairly decide any appeal which may emanate from that ruling. The record before this Court in the instant appeal fails to meet this standard.

There also seems to be a paucity of facts emanating from evidentiary hearings upon which the rulings should be founded. It seems evident that whenever necessary, upon remand, the bankruptcy court should review and consider the advisability of holding additional evidentiary hearings. At the very least, the bankruptcy court should require each party to list, in writing, any further evidentiary hearings they deem to be necessary. The bankruptcy judge can then review these requests to determine and then hold evidentiary

hearings on any such requests he may deem such hearing to be appropriate.

It is therefore

ORDERED AND ADJUDGED that this matter be, and the same is, hereby REMANDED to the United States Bankruptcy Court for the Southern District of Florida, to schedule and to hold such further adversarial hearings and to make and enter such findings of fact and conclusions of law as are necessary to provide this Court with an adequate basis to decide the instant appeal on the merits. This should all be accomplished WITHIN THIRTY (30) DAYS herefrom.

**THE DEBTORS' APPEAL IS NOT SUBJECT
TO DISMISSAL FOR MOOTNESS**

Earlier in this opinion, the Court examined the substantive elements of this appeal and the necessity of a remand to the bankruptcy court for the complete findings of fact and conclusions of law required by the applicable rules of procedure. The Court's discussion of those substantive issues makes it clear that the debtors' appeal is not a frivolous one and that, absent compelling cause, the interests of justice would best be served by allowing the appellants an opportunity to present their appeal from a fully developed record below.

The debtors made several efforts to obtain a stay of the bankruptcy court's orders pending the outcome of this appeal. The bankruptcy court, in its order of September 27, 1985, agreed to grant such a stay on the condition that the debtors post a supersedeas bond in the amount of One Hundred Forty Million (\$140,000,000) Dollars. The debtors thereupon took an emergency appeal to this Court from the bankruptcy court's stay order. The appeal was heard by Chief Judge James Lawrence King, who affirmed the bankruptcy court's grant of a stay, but reduced the amount of the supersedeas bond required to Fifty Million (\$50,000,000) Dollars to be posted on or before October 10, 1985. Appellants then took

an appeal from the district court's order to the Eleventh Circuit Court of Appeals, which appeal was dismissed by that court for lack of jurisdiction on October 9, 1985. Upon the debtors' failure to post the required bond, the bankruptcy court's stay terminated on October 10, 1985.

The Bank of New York, appellee in this cause, has moved to dismiss the appeal of Holywell Corporation and the other appellants on the ground that their appeal has been rendered moot by the appellants' failure, after several attempts, to obtain a stay of the implementation of the confirmation order pending this appeal. (A similar motion has been filed by the liquidating trustee, who is not a party to this appeal.) The appellee bases its motion to dismiss upon the "mootness doctrine" first codified in former Bankruptcy Rule 805 and followed by a significant number of decisions by courts throughout the United States. Rule 805 states, in pertinent part:

Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal.

Fed.R.Bankr.P. 8005, which replaced Rule 805 in 1983, does not contain any reference to the mootness standard of the previous rule. While that standard is preserved in the current bankruptcy code at 11 U.S.C. §363(m), this statute applies the mootness doctrine only to the sale of the debtor's property by the trustee or the debtor himself. Where, as here, the debtors' assets have been sold by the liquidating trustee, §363(m) is not applicable.

In the absence of a controlling statutory standard, this court must look to the applicable case law for guidance, as

the Eleventh Circuit Court of Appeals did in *In Re Sewanee Land, Coal and Cattle Company*, 735 F.2d 1294, 1296 (11th Cir. 1984). A survey of recent decisions regarding bankruptcy appeals filed without procurement of a stay of the proceedings below shows that the "mootness doctrine" stated by former Rule 805 is still widely accepted by courts throughout the United States. See, e.g., *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir. 1985); *In re Sewanee Land, Coal and Cattle Co.*, *supra*; *In Re Bel Aire Associates*, 706 F.2d 301 (10th Cir. 1983); *Greylock Glen v. Community Savings Bank*, 656 F.2d 1 (1st Cir. 1981). In each of these cases, however, the trial court order from which an appeal was taken was one approving the sale of the debtor's property. Indeed, the text of former Rule 805, to which these decisions refer, is specifically directed to "an order approving a sale of property." Where a bankruptcy court's order concerns matters other than the sale of property, the mootness doctrine may not apply. Thus, in *In Re Berg*, 45 B.R. 899 (Bankr. App. 1984), the Bankruptcy Appellate Panel of the Ninth Circuit ruled that the mootness standard embodied in former Rule 805 did not apply to an appeal from an order quieting title in the debtor's property, even where such property had been sold by the trustee and the proceeds distributed.

In an earlier decision, the Court of Appeals for the Ninth Circuit held that where a debtor appeals from several orders of the bankruptcy court, some of which are orders approving the sale of property, the debtor may appeal those orders not involved with the sale even in the absence of a stay. *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977). While the *Combined Metals* court considered appeals from ten separate orders of the bankruptcy court, Holywell Corporation and the other appellants before this court appeal from only two orders issued by Judge Britton in the proceedings below: the July 23, 1985 Order Approving Substantive Consolidation, and the Final Confirmation Order entered on August 8, 1985.

The order regarding substantive consolidation is clearly not one approving a sale of property; rather, it requires that the estates of the five debtors be combined to facilitate payments to their creditors. Should this court rule, after remand of this matter, in favor of the appellants on their appeal from the consolidation order, it can grant meaningful relief to the appellants by reversing the order, and that portion of the confirmed plan of reorganization which incorporates this order. For these reasons, the debtors' appeal of the bankruptcy court's order approving substantive consolidation is not moot, and will be decided by this court on its merits upon receipt of the findings of fact and conclusions of law ordered from the bankruptcy court.

The greater part of the present appeal concerns the Final Order of Confirmation and specific aspects thereof: the equitable subordination of certain creditors' claims, the requirement that the liquidating trustee dismiss the appellants civil suit, the validity of the estate valuation upon which the plan is based, and alleged procedural deficiencies in the conduct of the confirmation proceedings. Of course, the heart of the confirmed plan is the sale, *by the liquidating trustee*, of the Miami Center property for a purchase price of Two Hundred Fifty-five Million, Six Hundred Thousand (\$255,600,000) Dollars. The appellee contends that Judge Britton's order confirming the Bank's Plan of Reorganization, and hence this sale, is shielded from appellate review by the "mootness doctrine" of Rule 805 and the applicable case law.

The touchstone of those decisions, and of all determinations that a given suit or appeal is moot, is not the presence or absence of a single factual element (e.g., a sale of property). Rather the fundamental criterion for judging whether a case on appeal has become moot has consistently been whether the appellate court has been rendered incapable of granting effective relief to a petitioner due to a change in the circumstances of the case. *Mills v. Green*, 159 U.S. 651, 16 S. Ct. 132 (1895).

In the appeal before this court, the parties have informed the court that certain transactions have already taken place in accordance with the confirmation order issued below. The Miami Center property has been transferred by the liquidating trustee to a *designee of the appellee*, and certain claimants in classes three through six of the reorganization plan have been paid. The appellants, however, have frequently stated their approval of the payments made to such third-party creditors, and their intention that such claimants be satisfied regardless of the dispute between themselves and the appellee. This appeal is primarily directed at recovering title to the Miami Center property held by the Bank's designee and obtaining review of the bankruptcy court's substantive rulings noted above.

A crucial determination to be made is whether, accepting various actions have been taken by the liquidating trustee in reliance on the bankruptcy court's confirmation order, can effective relief be granted to the appellants should this Court decide, after the appeal is reinstated post-remand, that their appeal has merit? In determining that it is capable of granting such relief, this court has considered each of the points raised by the present appeal.

Reversal of the bankruptcy court's ruling on the equitable subordination of Miami Center Joint Venture, Holywell Telecommunications, and Holywell Leasing, Inc. would likewise return these entities to their pre-confirmation status; here, this would result in the three creditors being given the higher priority for their claims accorded to "arm's length" creditors. Denial of the liquidating trustee's authority to dismiss the appellants' district court suit would simply allow the action to remain viable, and review of the alleged procedural flaws in the valuation and other proceedings below would, at most, necessitate further hearings on those matters. Thus, the posture of this appeal, at least as it concerns the points of appeal discussed here, is by no means such that events have rendered meaningful review impossible.

Finally, and most significantly, should this court decide the substantive appeal before it in the appellants' favor, the sale of the Miami Center, and its equipment and fixtures, could be undone. The property was sold *not* to a disinterested, third-party purchaser, but to the appellee itself, through its designee, for a purchase price of Two Hundred Fifty-five Million, Six Hundred Thousand (\$255,600,000) Dollars. This purchase price was satisfied by the Bank by combining the debtors' outstanding mortgage obligations to the Bank with Thirty Million (\$30,000,000) Dollars in cash collateral which was derived through a sale, by the debtors, of certain Washington, D.C. property. Much of this latter cash fund has already been applied to pay the claims of certain secured creditors, which use the appellants have approved. Although the Miami Center is now held by the Bank's designee, it is still in the effective possession of the Bank which, as appellee in this matter, is under the jurisdiction of the court. Should this court decide, after reviewing the findings made by the court below on remand, that the entire plan of reorganization was erroneously approved, it could fairly order the transfer of the Miami Center property back to the debtors, on the condition that those funds taken from the Thirty Million (\$30,000,000) Dollars collateral for payment to creditors remain undisturbed or be applied in behalf of debtors. The Bank of New York would be returned to its position as chief secured creditor, and could either propose a different plan of reorganization before the bankruptcy court or pursue remedies available to it as mortgagee. The appellants would be returned to the status of debtors in possession of the property, and could likewise attempt to obtain creditor approval for an alternate plan while seeking a buyer for the Miami Center which would be willing to pay what the debtors contend is the property's true value.

This Court may ultimately reject the appeal presented by the debtors and uphold the bankruptcy court's orders on substantive consolidation and confirmation of the Bank of New York's plan. Today's opinion merely constitutes the

court's determination that the appeal is a viable one, and that the court, should it determine that the appellants' requested relief, or other suitable remedy, is appropriate, would be able to grant it. Before any determination of the merits of this appeal can be made, however, the court must await the result of its remand of this matter to the trial court for his provision of findings of fact and conclusions of law which will enable this court to make a fair and informed judgment of the merits of the appeal.

For the foregoing reasons, it is

ORDERED and ADJUDGED that the appellee's motion to dismiss be, and the same is, hereby DENIED.³

DONE and ORDERED in Chambers at Miami, Southern District of Florida, this 30 day of DECEMBER, 1985.

/s/ Sidney M. Aronovitz

SIDNEY M. ARONOVITZ
UNITED STATES
DISTRICT JUDGE

Copy furnished to:

S. Harvey Ziegler, Esq.

Thomas F. Noone, Esq. (New York, N.Y.)

Vance E. Walter, Esq.

Fred H. Kent, Esq.

Raymond W. Bergan, Esq. (Wash., D.C.)

Irving M. Wolff, Esq.

³There are several other appeals now pending in the United States District Court from the bankruptcy judge's rulings. These are before other judges, including two before Senior United States District Judge C. Clyde Atkins, and another before United States District Judge William Hoeveler.

APPENDIX N

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

In Re:

HOLYWELL CORPORATION, et al.,

Debtors.

**LIQUIDATING TRUSTEE'S FIRST REPORT
IN CONJUNCTION WITH CONSUMMATION
OF CONFIRMED PLAN OF REORGANIZATION**

COMES NOW, FRED STANTON SMITH, the duly appointed and qualified Liquidating Trustee, and files this First Report in Conjunction with Consummation of the confirmed Amended Consolidated Plan of Reorganization and Amendments thereto, filed by the Bank of New York (the Plan), and moves for the entry of an order approving said report, and states:

1. That this Court entered its Order confirming the Plan on August 8, 1985. Subsequent to numerous applications by the Debtors to stay the effective consummation of the Plan, including appellate procedures undertaken by said Debtors, the Debtors failed within the time allowed (5 p.m. October 10, 1985) to post the necessary supersedeas bond to effectuate the stay or to obtain a stay without bond. With the expiration of time, in accordance with the terms and conditions of the Plan, the Liquidating Trustee was required to undertake consummation of the Plan.

2. Commencing on October 10, 1985, the Liquidating Trustee and representatives of the Bank of New York closed the transaction and executed the necessary documents to effectuate the transfer of the real estate involved, i.e., the real estate pledged by mortgage to the Bank of New York. The transaction, in accordance with the terms and conditions of the Plan, required certain chattels involved in leases and owned by the Debtors to be transferred to the Bank of New York; this was also accomplished at the closing.

3. The closing was completed at 1 a.m. on October 11, 1985. Annexed hereto and made a part hereof as Exhibit A is a binder of the documents to effectuate the transfer of the properties. As set forth in the Closing Statement (item 10 of Exhibit A), the estate received \$8,168,509.60, of which sum, \$7,006,114.65 was deposited in an escrow account for the payment of real estate taxes for the years 1982 through 1984. The Trust reserved the right to readjust any of the items credited to the buyer should further investigation reveal that the Trust would be entitled to greater credits.

4. On October 11, 1985, the Liquidating Trustee marshalled all of the cash of the Debtors in Possession, whether the same was in bank accounts, certificates of deposit, Treasury Bills, etc. In addition to the net cash received by the Trust from the closing, the Liquidating Trustee took into his possession all of the balances of said bank accounts and other cash credits available to the estate in the nature of treasury bills, Repo Investments, etc. Annexed hereto and made a part hereof as Exhibit B is a Schedule as of October 11, 1985 of the cash and securities convertible to cash available to the Miami Center Liquidating Trust. It is called to the Court's attention that the Treasury Bills are enumerated as to purchase price, par value and liquidation value. Utilizing the liquidation value of the Treasury Bills, the total funds immediately available for distribution to all classes of creditors, as of October 11, 1985, was \$30,423,206.42.

5. It is further called to the Court's attention that the Liquidating Trustee was required to pay operating expenses of the Debtor in Possession as of October 10, 1985, and that said expenses of the Debtor in Possession were and are being paid. However, as of the date of filing of this report, reconciliation of said expenditures has been delayed because bank statements have not been supplied to the accountants for the Liquidating Trust to enable said accountants to reconcile the expenditures and determine the net cash available; however, the sums involved will have no bearing on distribution to creditors.

6. Administration claims (Class 1 under the Plan) originate from operational debt of the Debtors in Possession and from applications seeking administration awards and reimbursement of out of pocket expenses pending before the Court. Two claims totaling \$61,071.01, Miami Dade Water & Sewer Authority and Department of Revenue, State of Florida, can be paid immediately. Because of the availability of funds, the Liquidating Trustee has reserved the sum of \$2,250,000, which represents the total sums sought by all applicants for administrative allowances for services rendered which are compensable by law by the estate, and applications of parties specially appointed by the Court to represent the Debtors in Possession, including out of pocket expenses of said applicants, which must also be allowed by the Court. Therefore, with adequate reserves made for Class 1 creditors, distribution to inferior classes can go forward since the position for payment to said Class 1 creditors is preserved.

7. The Class 2 creditor has been paid, in accordance with Exhibit A attached hereto. On November 8, 1985, the Class 3 claim held by the Bank of New York in the principal amount of \$1,750,000 was paid by wire transfer. The Liquidating Trustee is awaiting the release and return of all collateral held by the Bank of New York in connection with said payment. In addition to principal, the payment included

interest at the contract rate of 12% of \$435,348.96 as of October 21, 1985 and \$510.42 per day to the date of payment.

8. Class 4 creditors consist of two groups. The first is comprised of creditors whose claims have not been allowed or settled and payment therefor must be reserved depending upon the outcome of present litigation. Therefore, the Liquidating Trustee has reserved the sum of \$2,500,000 for the contingency of these disputed claims. The second group is comprised of the following claimants and amounts, including interest as of November 22, 1985, which the Liquidating Trustee must pay in accordance with the terms and conditions of the Plan, and will pay (all computations of interest have been made as to principal only, no computation includes interest on interest; interest is allowed in accordance with the terms of the Plan at 12% from the date of commencement of the proceedings to the date of payment, November 22, 1985; all computations omit cents):

(a) Sefina Industries, Ltd., Claim 435, total payment \$437,999 (claim amount \$380,000, interest \$57,999).

(b) Touby Painting Corp., Claims 138, 177, 180, 196, 197, total payment \$280,235 (claim amount \$243,771, interest \$36,464).

(c) Economics Laboratory, Inc., Claim 74, total payment \$35,835 (claim amount \$31,173, interest \$4,662).

(d) Barnett Bank of South Florida, N.A., Claims 145, 146, 147, 148, total payment \$1,596,416 (amount of judgment claim is \$1,361,469.57); interest from date of the commencement of the proceedings to November 22, 1985 on that portion of judgment excluding interest allowed to April 16, 1984, i.e., the principal amount of the notes of \$1,225,000, is \$183,246). An additional amount of \$51,550 interest is allowed on the principal of \$1,225,000, representing the period from the date of entry of the judgment to the date of the commencement of the proceedings. The costs and interest computed in the judgment in the amount of \$136,620 (\$152.50

is costs, the balance is interest) are also allowed. It is called to the Court's attention that the Dade County Circuit Court reserved jurisdiction to allow attorneys fees in connection with the judgment entered by said Court on April 16, 1984. It is recommended that this Court in approving this report vacate the automatic stay provided by §362 of the Code, to permit Barnett Bank to proceed to obtain an award of fees if available to it in the Circuit Court. Should such an award be made, the reserve provided for is ample to permit the payment of such an award.

(e) Boys Electric, Inc., Claims 160, 161, 162, 322, total payment \$50,141 (claim amount \$43,574, interest \$6,567).

(f) Swing Stage Limited, Claim 195, total payment \$23,566 (claim amount \$20,500, interest \$3,066).

(g) Edd Helms Electrical Contracting, Inc., Claim 246, total payment \$46,896 (claim amount \$40,795, interest \$6,101).

(h) The Worcester Royal Porcelain Co., Ltd., Claim 252, total payment \$65,379 (claim amount \$56,872, interest \$8,507).

(i) Pietro Belluschi, Inc., Claims 256, 367, total payment \$345,752 (claim amount \$300,833, interest \$44,919).

(j) Hill York Company, Claim 298, total payment \$9,900 (claim amount \$8,613, interest \$1,287).

(k) Fence Masters, Inc., Claim 325, total payment \$1,774 (claim amount \$1,544, interest \$230).

(l) Barton Aschman Associates, Inc., Claim 340, total payment \$66,874 (claim amount \$58,173, interest \$8,701).

(m) Gunn Tile Company, Claim 348, total payment \$28,006 (claim amount \$24,363, interest \$3,643).

(n) Otis Elevator Company, Claims 25, 492, total payment \$339,850 (claim amount \$295,628, interest \$44,222).

(o) Aetna Drywall Contractors, Inc., Claim 343, total payment \$415,591 (claim amount \$296,323, interest awarded by Circuit Court \$50,564, interest computed since the commencement of these proceedings \$44,288, less a credit of \$584, representing six days interest since the judgment was entered six days after the commencement of these proceedings, and allowance of attorneys fees \$25,000).

The Liquidating Trustee reports that the foregoing items have been paid.

9. In addition to the foregoing, the Liquidating Trustee will pay \$357,272 to a group of lien holders who rendered services to the Debtors in connection with leasehold improvements and obtained partial satisfactions of said liens. The companies involved are United Steel Metal Co., Pierce Associates, Inc., The Poole and Kent Company, Johnson Controls, Inc. and Adelphia Automatic Sprinkler. This payment is in accordance with a settlement reached and will bear no interest if paid before December 31, 1985.

10. As to the Class 5 creditors, the Liquidating Trustee intends to pay the undisputed claims comprising said class, a total of \$559,851.40, and to further reserve \$2,750,000 for creditors of this class whose claims have not been liquidated.

11. Payment to Class 6 creditors, depending upon settlement negotiations, will require an expenditure of \$6,500,000 plus interest, and a reserve of \$2,800,000 plus interest. The Liquidating Trustee intends to pay and discharge all of the Class 6 undisputed claims as soon as possible.

12. It is further called to the Court's attention that the Class 6 creditor, Dynamic Food Service Equipment, Inc. (Claims 211, 215, 216), claims a principal indebtedness of \$738,424.86 plus interest from the date of filing. However,

the Liquidating Trustee is advised that in connection with the material supplied by said creditor to various of the Debtors, there is Florida state use tax (sales tax) in the amount of \$147,555.16 included in the claim. The Liquidating Trustee has been authorized to withhold said sum from payment of the claim, and when he is supplied with the proper use tax form duly executed, he will forward the form and a check for the withheld amount to the Florida Department of Revenue on behalf of the Debtors.

13. The Liquidating Trustee has available for the payment of cash dividends and to reserve for disputed, unliquidated and litigated claims the sum of \$30,423,206.42. Giving credit to the reserves to be established in the amount of \$11,116,298 and the funds necessary to be disbursed in the amount of \$12,608,666, which disbursements include social security and withholding taxes, the Liquidating Trust has sufficient funds to make the distribution to Classes 1 through 6 creditors and to reserve for disputed, unliquidated and litigated claims in said Classes.

WHEREFORE, the Liquidating Trustee submits this report and prays that this Court will approve the same and the consummation procedures and disbursements made by the Liquidating Trustee on behalf of the Miami Center Liquidating Trust in conformity with the confirmed Plan.

Respectfully submitted, this 22nd day of November, 1985.

/s/ Fred Stanton Smith

Fred Stanton Smith
Liquidating Trustee

HOLLAND & KNIGHT
Attorneys for Liquidating Trustee
1200 Brickell Avenue
Post Office Box 015441
Miami, Florida 33101
(305) 374-8500

By /s/ Irving M. Wolff
Irving M. Wolff

MIAMI CENTER LIQUIDATING TRUST
Schedule of Cash Accounts
As of October 11, 1985

CASH

Bank

Barnett
Florida National 1376139381
Florida National 0003093414
Florida National 0003126953
Florida National 0003126964
Florida National 0003126964
Florida National 0003126964
Florida National 0003098595
Florida National 0002842207
Florida National 0002842207
Florida National 0003093403
Florida National 0003093425
Florida National 0003151857

Account #

Account Name

Available Balance

Source

Miami Center-Ed Ball Bldg	\$ 135,000.00	Bank
Pavillion Hotel-payroll	1,392.07	Books
Hollywell Corp.	9,292.74	E. Schumacher
Hollywell Corp.	31,935.54	Bank
Hollywell Corp-Repo Investment	6,351,300.90	Bank
Miami Ctr. Ltd. Partnership	-0-	Books
Theodore B. Gould	65,650.30	E. Schumacher
Theodore B. Gould-Repo Investment	1,190,000.00	E. Schumacher
Pavillion Hotel Miami Center	168,332.86	Bank
Pavillion Hotel	1,376.37	Bank
Pavillion Promotion	2,250.98	Bank

\$8,156,531.76

TREASURY BILLS

For Florida National Bank

Account #

Account Name

Purchase Price

Par Value

Maturity

702842207
0003126964
0003131529
Twin Development
Holywell Corp.
T.B. Gould
Twin Development

\$ 2,137,961.75	\$ 2,200,000.00	3/13/86
6,996,327.98	7,265,000.00	3/13/86
650,055.94	675,000.00	3/13/86
11,319,734.04	11,749,000.00	3/27/86
-----	-----	
\$21,104,279.71	\$21,889,000.00	
-----	-----	
	\$30,045,331.76	
-----	-----	

\$ 21,371,133.00

(Liquidation Value)

EXHIBIT B

App. N-9



APPENDIX O

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-01590-BKC-TCB
CASE NO. 84-01591-BKC-TCB
CASE NO. 84-01592-BKC-TCB
CASE NO. 84-01593-BKC-TCB
CASE NO. 84-01594-BKC-TCB

CHAPTER 11

In re:

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, and
THEODORE B. GOULD,

Debtors.

ORDER ON REMAND

The District Court Order of Remand dated December 30 reached this court on January 6 (C. P. No. 1145). It requires that one or more hearings be held, proposed findings and conclusions be entertained, and that this court not later than January 29:

"make and enter such findings of fact and conclusions of law as are necessary to provide the District Court with an adequate basis to decide the . . . appeal on the merits."

At a conference held January 14, the debtor requested and on January 18 the court held an evidentiary hearing to receive additional evidence on three issues: (a) the value of the Miami Center Project, (b) the value to the estate of a lawsuit pending before Judge Hoeveler, and (c) the amount of the Bank's lien. The parties also requested leave to submit

their proposed findings and conclusions by January 23. The parties agreed that no other hearings were necessary.

Although counsel for MCJV and O&Y attended both hearings, neither they nor any party other than the debtors and the Bank participated.

On January 23, both the debtors (C. P. No. 1175) and the Bank (C. P. No. 1176) submitted comprehensive and detailed proposed findings and conclusions, respectively 43 and 52 pages in length.¹ In addition, the debtors filed on January 28 the debtors' 22-page response to the Bank's proposed findings and conclusions.

I presume counsel understand what will best assist Judge Aronovitz. Recognizing the weight accorded to adopted findings, *Anderson v. Bessemer City*, 470 U. S. ___, 84 L.Ed.2d 518, 527 (1985), I have used the time available to me to review carefully the proposed findings and conclusions and the debtors' Response together with the entire record, instead of attempting to reword and retype forty to fifty pages of similar detail. For the most part the facts flow from uncontroverted matters of record. The parties differ in the emphasis they give and the inferences they draw from the undisputed events.

I reject the proposals of the debtors as reflecting in essential respects the contentions I considered and rejected previously. I adopt the Bank's proposed findings of fact and conclusions of law, copies of which are attached and incorporated in this Order. They accurately represent my own considered conclusions as to both the facts and legal principles implicit in the Confirmation Order of August 8, 1985 (C. P. No. 906) and the earlier Consolidation Order (C. P. No. 840).

¹Official Form 31, prescribed by the Judicial Conference pursuant to Bankruptcy Rule 9009 as the form for a chapter 11 Order Confirming Plan, is a page and a half and contains only the eight statutory requirements of 11 U.S.C. §1129(a) rephrased as mixed findings and conclusions.

The earlier order followed one session of the extended confirmation hearing and resolved one bitterly contested element of the confirmation issues. It was not possible, in this case, to hear all the issues and parties during one uninterrupted session.

In a matter of this magnitude, fought as hard as this one has been, it is easy to lose sight of the forest while concentrating on the trees. Neither this review, the additional evidence tendered, nor the subsequent events have caused me to recede from the decisions I reached after spending a year with all the parties and the issues they presented, which I attempted to put into perspective in the Confirmation Order.

(Continue with pages 3 through 51 of *FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND* [Proposed by the Bank of New York].)

In accordance with the Order of Remand, the foregoing findings of fact and conclusions of law are hereby incorporated within, and made a part of, the Confirmation Order, *nunc pro tunc*.

DONE AND ORDERED at Miami, Florida, this 29th day of January, 1986.

/s/ Thomas C. Britton

Thomas C. Britton
Bankruptcy Judge

Copies to:

See attached service list.

Copies to parties and counsel as follows:

Honorable Sidney M. Aronovitz
U. S. District Court
301 N. Miami Avenue
Miami, FL 33128-7798

Pages 3 through 51 have not been included with this order because each party listed below should have received a copy of these pages with "Findings of Fact and Conclusions of Law upon Remand [proposed by the Bank of New York]." If you do not have this document, please call our office at (305) 536-4111 and we will furnish a copy.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

Proceedings Under Chapter 11

In re:

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, and
THEODORE B. GOULD,

Debtors.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW UPON REMAND

[Proposed by The Bank of New York]

These Chapter 11 proceedings began with the filing of voluntary petitions on August 22, 1984. Upon motion by the debtors, and because all of the debtors were controlled by debtor Theodore B. Gould, the cases were consolidated for purposes of administration on August 30, 1984 [C.P. No. 29].

Ultimately, the Court considered and ruled upon competing disclosure statements and plans of reorganization proposed by the debtors and by The Bank of New York (the "Bank"). On August 8, 1985, the Court entered an order confirming the Bank's amended, consolidated plan of reorganization, and denying confirmation to the five separate amended plans proposed by the debtors (the "Confirmation Order"; C.P. No. 906, now reported at 54 B.R. 41). The Court had previously entered a separate order approving those terms of the Bank's plan which provided for the substantive

consolidation of the five estates (the "Consolidation Order"; C.P. No. 840).

The debtors appealed the Confirmation and Consolidation Orders to the United States District Court (*Holywell Corp., et al., v. The Bank of New York*, Case No. 85-3225-Civ-Aronovitz). By order entered December 30, 1985 (the "Order of Remand"), the District Judge remanded the case to this Court for the entry of more detailed findings of fact and conclusions of law in respect to the matters determined by the Confirmation and Consolidation Orders.

As suggested by the District Court in the Order of Remand, the Court has solicited and reviewed written submissions by the parties on the question of whether any further hearings should be held upon remand [C.P. No. 1162, 1167]. At an emergency conference on that issue held on January 14, 1986, the debtors requested an opportunity to present evidence on (a) the value of the Miami Center Project, (b) the value to the estates of a pending lawsuit, and (c) the calculation of the Bank's lien. An evidentiary hearing on those issues was conducted on January 18, 1986. Although the Bank took the position that the record before remand was sufficient, the Bank presented evidence in response to that presented by the debtors at the supplemental hearing. At the conclusion of the hearing, the Bank and the debtors advised the Court that no further evidence was required [transcript of January 18, 1986 hearing, page 113]. Counsel for MCJV and O&Y attended the January 14 conference and January 18, 1986 hearing, but did not participate.

Based upon the complete record before the Court, the Court hereby enters the following findings of fact and conclusions of law:

Findings of Fact

A. Parties

1. The debtors are Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, a Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

2. The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Pavillon Hotel, retail space between them known as the "Podium", and an adjoining parking garage (collectively, the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

3. Miami Center Joint Venture ("MCJV") is a Florida general partnership formed by debtor Gould and Olympia & York Florida Equity Corp. ("O&Y"), a Florida corporation established by a large Canadian real estate development company. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the Phase I Project. Gould and O&Y originally planned to construct Phases II and III of Miami Center on those lots, but disputes and litigation between the two partners prevented any such construction.

4. Holywell Leasing Company ("HLC") and Holywell Telecommunications Company ("HTC") are two of numerous non-debtor subsidiaries wholly owned by debtor Holywell (wholly owned, in turn, by Gould). Gould was president of each at all material times.

5. Over 400 other creditors have an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by this Court, and have been active, for the Holywell, MCLP, and MCC estates.

B. *Jurisdiction*

6. This Court has jurisdiction over these reorganization proceedings and over the parties pursuant to 28 U.S.C. §157, the standing order of reference in this District, and the Order of Remand.

C. *The Debtors' Plans*

7. The debtors filed a separate, amended disclosure statement and plan for each estate; however, all were nearly identical in form and substance [C.P. No. 466-470].

8. The debtors' plans were predicated upon:

(a) the sale of the Miami Center Project to Hadid Investment Group, Inc. ("Hadid") for \$260 million;

(b) the payment of undisputed claims from approximately \$32 million realized by Holywell, a wholly-owned subsidiary, and Gould in January, 1985 from the sale of other real estate in the Washington, D.C. area (by Order entered December 31, 1984, C.P. No. 303, such funds were determined to be cash collateral under 11 U.S.C. §363, subject to the Bank's first lien);

(c) the pursuit in the District Court of a lawsuit against the Bank and its participating lenders (*Miami Center Limited Partnership, et al. v. The Bank of New York, et al.*, Case No. 85-0228-Civ-Hceveler; the "District Court Action") for alleged fraud, usury, breach of contract, and civil claims under the federal RICO act; and

(d) equitable subordination of the Bank's construction loan and mortgages under 11 U.S.C. §510(c).

D. *Objections to the Debtors' Plans*

9. Objections to the debtors' amended plans were filed by:

(a) O&Y [C.P. No. 533], upon the grounds that:

(1) the debtors' plans were based on a "wholly speculative agreement" with Hadid, "replete with holes and contingencies";

(2) O&Y and MCJV, "would be subjected to continuing delays, mounting costs and interest charges", and:

The past record of the Debtors, and notably of Mr. Gould as the controlling and dominating person, is replete with evidence of unfounded representations, commitments and undertakings breached, and a myriad of obligations, assurances and agreements unfulfilled and repudiated. The record in these very proceedings, reflect the repeated experiences of partners and creditors with such abandoned commitments and undertakings.

[Id., Paragraph 3];

(3) "Gould, as proponent of the Debtors' consolidated plans, in light of his loss of credit and credibility in the real estate and financial markets, is perhaps the least likely prospect to achieve a prompt sale and disposition of the properties concerned and a discharge of the claims of creditors." *[Id., Paragraph 5];*

(4) the debtors' plans classified the O&Y claims "in a separate and subordinate class", below those of other unsecured creditors;

(5) the debtors' plans lacked "sufficient funds . . . to provide for the repayment of all of [O&Y's] claims";

(6) the debtors' plans failed to provide for the discharge of the claims of O&Y under two agreements

covering certain furniture, fixtures and equipment (the "FF&E"); and

(7) the debtors' plans failed to provide for the payment of debtor Holywell's liability, "to MCJV and [O&Y] of an amount of approximately \$1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation" [*Id.*, Paragraphs 13 and 14].

(b) the Bank [C.P. No. 535], upon the grounds that:

(1) the debtors' plans were misleading, and were based upon contingencies unlikely to materialize and requiring years of litigation to resolve;

(2) the debtors' plans failed to meet the "best interest of creditors" (Section 1129(a)(7)), feasibility (Section 1129(a)(11)), and "cram down" (Section 1129(b)(1)) requirements under the Code; and

(3) the debtors' "equitable subordination" proposal in respect to the Bank's liens was moot in light of this Court's March 20, 1985 decision [C.P. No. 20 in Adv. Pro. No. 85-0160-BKC-TCB-A] holding that two releases executed by the debtors in favor of the Bank (and its participating lenders) barred the debtors' claims of wrongdoing.

(c) the MCC and MCLP Creditors' Committees [C.P. No. 567], upon the grounds that:

(1) the debtors' plans were not feasible, because the Hadid contract was "not a true and valid offer";

(2) the matter of equitable subordination of the Bank's claim had been adjudicated against the debtors;

(3) the debtors' plans would eliminate the estates' equity because of the accrual of interest on the Bank's mortgages during the litigation and the Hadid contract delays;

(4) the debtors' plans unfairly discriminated against creditors and were not fair and equitable;

(5) the debtors failed to comply with 11 U.S.C. §1129(a)(5)(A)(i); and

(6) the debtors made solicitations of creditors through improper "telephone calls and a mailgram, which did not truthfully represent the facts", attempting in bad faith to obtain acceptance, in contravention of 11 U.S.C. §1126(e).

(d) Julian J. Studley, Inc. [C.P. No. 526], an unsecured creditor, because of the improper classification of its claim and failure to comply with 11 U.S.C. §1123(a)(4).

(e) the Holywell Creditors' Committee [C.P. No. 516], upon the following grounds:

(1) the "illusory" nature of the debtors' plans because, "they do not present a binding contract with a purchaser, but represent merely an option to a real estate broker which can be extended through September, 1985, under the Contract", and the "down payment" was merely a promissory note; and

(2) the debtors' plans would entail substantial delays because of (i) the "study period" and extensions under the Hadid contract and (ii) the litigation involved in the attempt to subordinate the Bank's claims.

E. The Bank's Plan

10. The Bank filed an amended, consolidated disclosure statement and plan [C.P. No. 478] which was further amended [C.P. No. 854] during the course of the confirmation proceedings. The Bank also entered into certain stipulations with the Creditors' Committees [C.P. No. 564, 614, 709c, and 876a]. Neither the stipulation nor the second amendment to the Bank's plan adversely affected any party other than the Bank.

11. The central features of the Bank's amended, consolidated plan are:

(a) the purchase by the Bank (or its designee) of the Miami Center Project, including the FF&E, for its MAI-appraised value of \$255.6 million, comprised of (i) satisfaction of the Bank's judgment lien, computing interest at the contract or "good standing" rate rather than the higher default rate, and (ii) the balance, after closing adjustments and prorations, in new cash;

(b) the establishment of the "Miami Center Liquidating Trust", consisting of all other assets of the debtors, for the payment of all other claims by a court-appointed Liquidating Trustee;

(c) the release by the Bank of its cash collateral (approximately \$30 million), for addition to the new cash generated by the sale of the Miami Center Project (approximately \$13.6 million), with the combined funds to be used by the Liquidating Trustee to pay the claims of all other creditors;

(d) a further financing commitment of approximately \$14.4 million by the Bank for payment of the claim of MCJV for the FF&E, (i) if and when such claim is allowed over the Bank's pending objections, (ii) to the extent other assets of the Liquidating Trust prove insufficient to pay the claim, and (iii) if it is ultimately determined that MCJV has been damaged by its (allegedly) improper classification under the Bank's plan;

(e) dismissal of the District Court Action by the Liquidating Trustee; and

(f) the consolidation of all five estates in a manner such that the unaffiliated creditors of Holywell are paid first, the unaffiliated creditors of the other debtors are paid next, and the many inter-debtor and related party claims are paid thereafter.

F. Objections to the Bank's Plan

12. Objections to the Bank's Plan were filed by:

(a) the Holywell Creditor's Committee [C.P. No. 515], but these objections were subsequently withdrawn by stipulation [C.P. No. 614, paragraph 6];

(b) O&Y [C.P. No. 532, 817a, 871], upon the grounds that:

(1) the Bank's plan assumes title to the MCJV FF&E without adequate and priority payment of sums allegedly due under the FF&E agreements; and

(2) the Bank's plan, "fails to provide for payment of Gould's and Holywell Corporation's obligations to O&Y through MCJV of an amount of approximately \$1.7 million . . . arising from Gould's and Holywell's acts of diversion and misappropriation . . .".

(c) Shutts & Bowen, a creditor and law firm representing the debtors [C.P. No. 537a], upon the grounds that:

(1) the Bank's plan is "unfairly discriminatory and is not fair and equitable" to impaired classes;

(2) the Bank's valuation of assets and claims is erroneous;

(3) the Bank's plan assumes liabilities of MCJV;

(4) the Liquidating Trust is violative of 11 U.S.C. §1129(5)(A)(i); and

(5) the plan's priority scheme does not comply with 11 U.S.C. §1129.

(d) MCJV [C.P. 808], though comprised of Gould and O&Y, in separate objections alleging that the plan fails to provide proper payment and priority for the MCJV FF&E claims.

(e) the debtors [C.P. No. 534, 545, 580, 849, and 888a], upon the grounds that:

(1) the Bank's plan fails to pay in full for the FF&E;

(2) the Bank's plan deprives mechanics' lien claimants of their security;

(3) the Bank's plan and disclosure statement are misleading;

(4) substantive consolidation would only result in "unjust enrichment" to the Bank and other creditors;

(5) the Bank's plan would cause the limited partners to lose their investment and to become liable for additional taxes;

(6) the District Court Action would be "summarily" dismissed, "without due process of law"; and

(7) the appointment of a Liquidating Trustee violates 11 U.S.C. §1104(a).

G. Voting by the Creditors

13. After the debtors' and the Bank's disclosure statement were approved, and pursuant to this Court's order [C.P. No. 405], separate ballots for the debtors' plans and for the Bank's plan were transmitted to all creditors for return by April 29, 1985. On that date, the Court held an initial confirmation hearing and, with the assistance of counsel, established a procedure for the tabulation of the ballots and for certification by the plan proponents of the availability of all funds necessary for consummation should a plan be confirmed [C.P. No. 611, 612, 619].

14. The requisite certificates respecting the voting and the funding were filed by each side on May 13, 1985, as directed [C.P. No. 658-664], and were reviewed by the Court.

15. The voting indicated overwhelming support for the Bank's plan among the creditors, and rejection of the debtors' plans. Creditors in Classes 1 through 6 approved the Bank's plan by well over the minimum margins required (one-half in number and two-thirds in dollar amount, per 11 U.S.C. §1126(c)). However, O&Y and MCJV (Class 7 under the Bank's plan), certain wholly-owned subsidiaries of Holywell controlled by Gould (Class 8), and the debtors themselves (Class 9), voted against the Bank's plan. Accordingly, the Court was required to determine whether the plan met the requirements of 11 U.S.C. §1129(b).

H. Establishment of the Bank's Lien

16. In order to establish the amount, validity, and priority of its lien over the debtors' property, the Bank filed an adversary proceeding against the debtors (Adv.Pro.No. 85-0160-BKC-TCB-A).

17. The debtors sought a stay of the scheduled trial of the lien proceeding (a) initially in the Bankruptcy Court [C.P. No. 3A in Adv.Pro. 85-0160], and (b) then in the District Court Action. Both Courts refused to enter such a stay, and the trial went forward as scheduled.

18. That proceeding culminated in the entry by this Court of:

(a) a final judgment in favor of the Bank for principal and interest of \$234,342,742.93, plus interest of over \$75,000 per day from March 14, 1985, forward [C.P. No. 21 in Adv.Pro. 85-0160]; and

(b) a memorandum decision upholding the two releases executed by the debtors in favor of the Bank (and its participating lenders), and determining that those releases barred the fraud, breach of contract, usury, and RICO theories raised by the debtors as purported defenses in this Court and as claims in the District Court Action [C.P. No. 20 in Adv.Pro. 85-0160].

At the remand hearing on January 18, 1986, the debtors presented evidence which purported to show a discrepancy in the amount of the Bank's lien. However, since that amount has been embodied in a final judgment [C.P. No. 21 and Adv. Pro. 85-0160] that is now on appeal before the District Court (*Gould et al. v. The Bank of New York*, Case No. 85-2263-Civ-NCR), the Court will not revisit that issue. The Court has also been directed to the debtor's brief in that appeal which states, at page 23, that the debtors, "do not contest that the principal amount advanced by The Bank of New York is \$196,711,481.58", exactly the amount set forth in the final judgment [transcript of hearing of January 18, 1986, page 11].

I. *The FF&E Leases*

19. Next, as part of the continuing confirmation process, the parties advised the Court that characterization of two agreements, relating to the FF&E and between MCJV and MCLP (debtor Gould was managing general partner of each), as "true leases" or as "financing agreements" could be dispositive of the FF&E claims asserted by O&Y and MCJV. The Bank filed [Adv.Pro.No. 85-0566-BKC-TCB-A] an adversary proceeding against the affected parties seeking a determination of the nature (secured or unsecured), extent, and value of such claims. The Bank also filed an objection to the FF&E claim filed by O&Y and MCJV [C.P. No. 811], which remains pending.

20. After an evidentiary hearing, the Court entered an extensive memorandum opinion [C.P. No. 26 in Adv.Pro. 85-0566] holding that the two agreements were "true leases" (and, therefore, that MCJV owned the FF&E subject to debtor MCLP's option rights under the leases). The Court was not asked to, and did not, determine in that proceeding the priority of MCJV's claim or the proper amount of that claim assuming exercise of MCLP's option to acquire the FF&E (as provided by the Bank's plan).

J. Substantive Consolidation

21. Thereafter, the parties furthered the confirmation process by noticing an evidentiary hearing upon the debtors' objections to the substantive consolidation feature of the Bank's plan. Both sides presented evidence and argument [C.P. No. 844] on the issue.

22. The Court determined, based upon facts and authorities detailed below (Paragraphs 29-41 and 58-67), that substantive consolidation is in the best interest of creditors, is not prejudicial to the debtors, and is appropriate on the record before the Court [Consolidation Order, C.P. No. 840]. Under the plan, the creditors have received or will receive more than they would in liquidation. 11 U.S.C. §1129(a)(7).

K. Further Hearings

23. During the confirmation process (April 29 through August 8, 1985), the Court held numerous other hearings and invited counsel to submit such memoranda and request such hearings as they might deem appropriate or necessary to supplement the already-voluminous record before the Court. During that time, no further evidentiary hearings were requested.

24. However, pursuant to the Order of Remand and the written request of counsel for the debtors, a further evidentiary hearing was conducted on January 18, 1986, for the submission of evidence regarding:

- (a) the value of the Miami Center Project;
- (b) the value or "cost/benefit" of the District Court Action; and
- (c) the calculation of the Bank's lien.

L. Findings As to the Debtors' Plans

25. At the instance of the Bank, the deposition of the President of Hadid Investment Group, Inc. (the proposed

purchaser of the Miami Center Project for \$260 million under the terms of the debtors' plans), Mohammed A. Hadid, was taken on April 19, 1985 [C.P. No. 649]. Hadid's testimony and the deposition exhibits demonstrate, and the Court finds, that:

(a) the Hadid contract had no fixed closing date, and was little more than an open-ended option;

(b) Hadid was still searching for a principal to finance or acquire the Project under the contract, and did not have the wherewithal independently to close the purchase;

(c) Hadid and any such principal would not deal with the Project until the "cloud of bankruptcy" was removed; and

(d) the "down payment" was a mere promissory note of dubious enforceability.

26. As is evident from the results of the voting (see Paragraphs 14 and 15, *supra*), numerous classes of creditors voted against the debtors' plans.

27. The "equitable subordination" of the Bank's judgment, as proposed by the debtors, would not have been permitted because the debtors had specifically released any and all such claims against the Bank and its participating lenders [C.P. No. 20 in Adv.Pro. 85-0160].

28. The debtors' numerous disputes and litigation on nearly every front—with the IRS, the City of Miami, the *ad valorem* tax authorities, the general contractor, the debtors' former lawyers, the former hotel operator (Trusthouse Forte), O&Y, the leasing agent (Julian J. Studley, Inc.), prospective tenants, and the Bank—would have continued or even increased under the debtors' plans, such that the funds of the estates otherwise available for the payment of claims to creditors would have been substantially eroded by legal fees and other costs of litigation. All such litigation is detailed in the debtors' amended schedules [C.P. No. 275-278] and disclosure statements [C.P. No. 377-381]. It is likely that

consummation of the debtors' plans would have been followed by liquidation or by a need to further reorganize. 11 U.S.C. §1129(a)(11).

M. *Findings on Substantive Consolidation As Proposed by the Bank's Plan.*

29. All of the Creditors' Committees supported substantive consolidation. No creditor (except for those controlled by Gould) objected to substantive consolidation.

30. Gould's testimony at deposition, to which the Court was directed at the hearing on substantive consolidation [C.P. No. 385h], was:

Q: Is it fair for us to conclude that Holywell, the parent company, is the ultimate beneficiary of any and all profits that these companies make?

A: [Mr. Gould]: Yes, it is. [Page 31].

* * *

Q: Has it been customary for these interrelated companies to move money back and forth?

A: Yes. [Page 202].

* * *

Q: Did either of these two corporations operate at a profit?

A: All of them did.

Q: All of that money was dividended up to Holywell?

A: Yes.

Q: Then you, as the sole stockholder in Holywell, got a dividend from Holywell?

A: No. All the funds during the past four years have been loaned to this project.

Q: Holywell—

A: All of the funds that Holywell has earned during the past four years have been loaned to the Miami Center Limited Partnership. [Page 55].

Moreover, the debtors specifically asked the Court to approve (and the Court did approve) as undisputed liabilities of the debtors, payments to terminated employees of Holywell's wholly-owned subsidiaries: Parkwell, Inc.; Parkwell of Florida; Holywell Construction Co.; Holywell Telecommunications Co.; Florida Viking Properties; Orion Engineering Services; Whitehall Building Services; Whitehall Security Corp.; and Holywell Hotels, Inc. [C.P. No. 609, Exhibit "B"]. All such employees performed services for the Miami Center Project owned by debtors MCLP and Chopin.

31. The debtors' schedules [C.P. No. 275-278] show, and the debtors have never disputed that:

(a) Gould owns 100% of debtor Holywell;

(b) Gould is jointly and severally liable for all of the debts of debtor MCLP and of debtor Chopin because he is a general partner of each (Sections 620.62 and 620.625, Florida Statutes);

(c) Holywell owns 100% of debtor MCC and of Holywell's numerous other subsidiaries; and

(d) MCC is also jointly and severally liable for all debts of MCLP and Chopin, because MCC is a general partner of each.

32. The debtors' outside accountant testified, and the Court thus finds, that Holywell's financial statements were consolidated with those of debtor MCC [C.P. No. 844, pages 37-38].

33. The debtors cross-guaranteed each other's liabilities to the Bank and to various other creditors. Many creditors

filed claims against the wrong debtor or debtors as a result. For example:

(a) Holywell Construction Company, a wholly-owned subsidiary of debtor Holywell, was "an agent of [debtor] Miami Center Limited Partnership" [C.P. No. 788, page 37; see also page 100].

(b) Holywell Real Estate Corporation, another of the many wholly-owned subsidiaries of debtor Holywell, entered into a contract for work at Miami Center that was always to be paid by debtor MCLP [*Id.* at page 45; the Court held debtor Holywell liable].

(c) The State of Florida, Department of Labor, believed its claims were against "Holywell Hotels, Inc., trading as Pavillon Hotel", rather than against debtor Holywell [*Id.* at page 99].

(d) Debtor MCLP acknowledged indebtedness for purchases made by Whitehall Security Corporation, another wholly-owned subsidiary of debtor Holywell [*Id.* at page 104].

(e) Debtor Holywell furnished credit information in support of credit extended for purchases by debtor MCLP, and was invoiced for those purchases [*Id.* at 123-29].

(f) A Miami law firm invoiced debtor Holywell for services allegedly obtained for debtor MCLP, apparently by Holywell Construction Company [*Id.* at 147-49].

34. The creditors filed overlapping claims because of their confusion. The debtors objected to over 300 claims on the grounds that the claims were filed against the wrong debtors [C.P. No. 577-579, 584-86, 588, 589].

35. The schedules claim the following inter-company indebtedness, among others, between various debtors and their wholly-owned subsidiaries:

(a) MCLP owes Holywell \$4,080,395.21.

(b) MCLP owes Holywell's wholly-owned subsidiary "Charleston Center Corp." \$2,067,801.71.

(c) MCLP owes debtor Chopin \$11,528,389.33.

(d) MCLP owes Holywell's wholly-owned subsidiary "Holywell Construction Co." \$500,832.12.

(e) MCLP owes Holywell's wholly-owned subsidiary "Holywell Hotels, Inc." \$1,923,862.81.

(f) MCLP owes Holywell's wholly-owned subsidiary "Holywell Management Co." \$222,004.55.

(g) MCLP owes Holywell's wholly-owned subsidiary HTC \$64,489.59.

(h) MCLP owes Holywell's wholly-owned subsidiary "Orion of Washington" \$499,333.00.

(i) MCLP owes Holywell's wholly-owned subsidiary "Orion Engineering Services" \$275,704.74.

(j) MCLP owes Holywell's wholly-owned subsidiary "Parkwell, Inc." \$114,249.21.

(k) MCLP owes Holywell's wholly-owned subsidiary "PBA Architects, Inc." \$856,709.17.

(l) MCLP owes Holywell's wholly-owned subsidiary "Pietro Belluschi, Inc." \$300,833.

(m) MCLP owes Gould \$2,215,539.09.

(n) MCLP owes Holywell's wholly-owned subsidiary "Whitehall Building Services, Inc." \$26,385.47.

(o) MCLP owes Holywell's wholly-owned subsidiary "Whitehall Security Corp." \$1,543,938.86.

(p) Gould owes Holywell \$1,750,000 plus interest.

(q) Holywell is owed the following by its wholly-owned subsidiaries:

Charleston Center Corp.	\$1,814,066.09
PBA, Inc.	1,201,578.97
TBG Institute	1,199.00
Parkwell of Florida	1,937.54
Whitehall Security Corp.	2,535.35
Whitehall Building Services, Inc.	7,617.15
Orion Engineering	3,359.28
Holywell Management	59,724.88
Racing Club	82,597.81
Holywell Hotels, Inc.	5,000.00
Holywell Trading	834.35
Holywell Real Estate	137,784.49
Holywell Telecommunications Co.	471,115.39
Holywell Insurance Company	10,541.46
Studley/Holywell Associates, Inc.	30,493.08

36. The foregoing intercompany indebtedness exceeds \$31,800,000. Since Gould controlled both the purported obligor and the obligee with respect to each such liability, and since he admitted on deposition that he advanced all of the income from all of the debtors through Holywell to assist with MCLP's development of the Miami Center Project [See Paragraph 30, *supra*], such advances cannot be characterized as arms'-length or as founded upon adequate consideration.

37. Exhibit 4, Question 19b, in Holywell's Statement of Financial Affairs [C.P. No. 275] indicates that Gould paid himself (because he owned and controlled Holywell) \$1,051,844.67 from debtor Holywell's cash during the 11-month period before the bankruptcy, and that Holywell made a loan of \$1,750,000 to Gould on October 14, 1983. During the hearing on this issue on July 18, 1985, Holywell's chief financial officer conceded [C.P. No. 844, pages 57, lines 19-24] that the Holywell-Gould loans were not evidenced by a written note. Schedule B-2 to the Statement of Financial Affairs shows that Holywell owned 100% of 19 different subsidiaries (only one, MCC, is a debtor), and that 14 of those

subsidiaries allegedly owed money (about \$3.8 million) to Holywell.

38. MCLP's Statement of Financial Affairs [C.P. No. 276] also reflects numerous inter-debtor transactions and debts (most are summarized at Paragraph 35, *supra*). MCLP, though admittedly in default under its loans with the Bank at the time, paid Holywell over \$1.2 million [*Id.*, Exhibit 13(a)] in the seven months preceding the bankruptcies.

39. MCC's schedules [C.P. No. 277, Schedule B-2] show that Holywell owed MCC \$889,779, and that MCC (wholly owned by Holywell) owned a 47.88% partnership interest in MCLP and a 64% partnership interest in debtor Chopin. The schedules also confirm [Schedule A-2] that MCC is liable as a general partner for the debts of MCLP and of Chopin.

40. Gould's schedules [C.P. No. 278, Schedule A-1] show claims against him by the IRS of over \$2.5 million because (a) Gould was an officer of debtor Holywell's wholly-owned subsidiaries Holywell Construction Company and Holywell Hotels, Inc., and (b) he failed to cause those entities to pay federal withholding taxes. The schedules also admit [Schedule A-2] Gould's liability as general partner for MCLP's debts (other than any non-recourse mortgages) and for Chopin's debts. Finally, Gould listed ownership [Schedule B-2] of 17% of MCLP and 36% of Chopin.

41. Thus, debtor Gould owned all of debtor Holywell, which in turn owned all of debtor MCC. Gould therefore owned, directly or indirectly through Holywell and MCC, general and limited partnership interests constituting 64.88% of MCLP and 100% of Chopin. The debtors have never disputed that Gould personally controlled all five of the co-debtors.

N. *Findings on Classification Under the Bank's Plan*

42. The objections relating to the classification structure of the Bank's plan came only from entities which Gould

controlled (MCJV, of which he was "managing venturer" and general partner, and HTC and HLC, of which he was president—and which he owned through his 100% ownership of Holywell), or with whom he was a partner (O&Y and the minority limited partners of MCLP).

43. The claims of MCJV and O&Y were classified as "Class 7" under the Bank's plan, junior in priority of distribution to the claims of general unsecured creditors that were not affiliated with Gould (Class 6). The MCJV and O&Y claims are not substantially similar to the claims of those unaffiliated creditors, because:

(a) Any distribution to MCJV increases the value of debtor Gould's 50% equity in MCJV;

(b) MCJV has recourse to Gould's equity interest in MCJV's valuable real estate, while the unaffiliated unsecured creditors have no such recourse (the MAI appraisal filed by the debtors indicated that the four unimproved parcels owned by MCJV were worth \$104 million [C.P. No. 149, Exhibit "C"; also of record at C.P. No. 822, Exhibit "A"], while the liabilities of MCJV have been represented to be approximately \$60 million;

(c) the MCJV claim was asserted by a purported creditor (MCJV) controlled by a debtor (not the case for any Class 6 creditor); and

(d) similarly, O&Y stands to realize 50% of any distribution to MCJV, and has recourse against Gould's 50% equity in MCJV, for O&Y's claims against the debtors.

44. Similarly, the claims of HTC and HLC (each wholly owned by debtor Holywell and controlled by Gould), assigned to Class 8, are substantially dissimilar to the claims of the unaffiliated, Class 6 unsecured creditors. 100% of any payment to HTC or HLC directly benefits (and is readily available to) debtors Holywell and Gould. Payments to

unaffiliated creditors, on the other hand, do not result in any other direct or indirect benefit to any debtor.

45. The limited partners of MCLP hold equity interests rather than claims, and were assigned to Class 9. Such interests are not substantially similar to the claims of any of the senior classes under the Bank's plan.

O. Findings on Equitable Subordination

46. The entities affiliated with Gould and objecting to classification junior to the claims of general unsecured creditors have consistently maintained that this Court lacked a sufficient factual basis to equitably subordinate such claims. The Order of Remand directed the Court to enter detailed findings on the issue. As the conclusions of law demonstrate (see Paragraphs 68-74, *infra*), the Court approved the junior classification accorded such claims by the Bank's plan because the Court found that those claims were not substantially similar to the claims of the senior classes (as specified by 11 U.S.C. §1122) that had no such affiliation with the debtors.

47. So that the record is clear, however, the factual prerequisites for equitable subordination of the MCJV, O&Y, HTC, and HLC claims are also established by the record. Gould engaged in inequitable conduct, including:

(a) The payment of enormous sums of money to himself (see Paragraph 37, *supra*), at a time when he was refusing to pay numerous unaffiliated creditors of all of the debtors;

(b) conflicts of interest resulting from his control of both lessor and lessee under the MCJV-MCLP FF&E agreements, the HTC-MCLP FF&E agreement, the HLC-MCLP FF&E agreement, and the Chopin-MCLP ground lease; and

(c) his failure to pay withholding taxes for Holywell Hotels, Inc. and Holywell Construction Company (see

Paragraph 40, *supra*), with the result that his estate was charged for the \$2.5 million in penalties under 26 U.S.C. §6672, to the detriment of creditors.

48. Gould's misconduct injured his creditors and, but for the substantive consolidation of the five estates and junior classification of the related-party claims as provided by the Bank's plan, Gould's inter-company liabilities would have permitted Gould, and non-debtor entities controlled by him, to receive distributions from the "cash-rich" estates (the Gould and Holywell estates, if contingent liabilities are disregarded), while unaffiliated creditors of the cash-poor estates (principally MCLP) would have received dividends (if any) amounting to less than full payment of their claims. All such misconduct is imputed as a matter of law to the entities for which Gould acted (see Paragraph 62(a) in the Conclusions of Law which follow).

P. Valuation of the Project

49. Prior to confirmation, no party or attorney for a party requested a valuation hearing. The Court had before it the following evidence as to the value of the Miami Center Project:

(a) the debtors' appraisal [C.P. No. 392], setting the value of the Project at \$260.5 million (land and buildings) plus \$14.5 million (FF&E) as of October 1, 1984;

(b) the Hadid contract [Exhibit "A" to C.P. No. 378] of February 11, 1985, for a gross purchase price of \$260 million, apparently exclusive of the FF&E;

(c) the liquidation values assigned to the property by the debtors in their disclosure statements: \$210 million for the structures [Exhibit "E" to C.P. No. 378] and \$23.4 million for the underlying land [Exhibit "E" to C.P. No. 380], or a total of \$233.4 million without the FF&E; and

(d) the Bank's appraisal [C.P. No. 479, 796], setting the value of the Project including the FF&E at \$255.6 million as of November 15, 1984.

50. Upon remand, the parties presented the testimony of their respective appraisers. Each appraiser adhered to his prior estimate of value [transcript of hearing of January 18, 1986 (not yet docketed), pages 62-108].

51. Upon the record before the Court prior to confirmation, the Court found that the Bank's proposed purchase price of \$255.6 million, including the FF&E, was fair and equitable, and considerably in excess of the liquidation value of the Project as computed by the debtors. The Bank's offer was the only firm offer available, and had the added benefit of releasing over \$30 million of the Bank's cash collateral for the payment of other creditors. In the Confirmation Order of August 8, 1985, this Court noted:

The debtors' major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

The absence of offers in excess of the Bank's proposal is significant. The Bank's purchase price and MAI appraisal (\$255.6 million, including FF&E) are between the debtors' liquidation estimate (\$233.4 million, without FF&E) and the debtors' MAI appraisal (\$260.5 million without FF&E, or \$275 million with FF&E). The two appraisers agree that the income approach to value should be given the greatest weight. The debtors' appraisal computed a value of \$267 million under that approach [C.P. No. 392, page 99], while

the Bank's appraiser's comparable estimate was \$255.6 million. The difference between the values, less than 5% apparently occurred because the debtors used estimated taxes and assessments of \$4 million per year, while the Bank's appraiser used the actual taxes and assessments imposed by Dade County and the City of Miami (approximately \$5.2 million per year) [transcript of hearing of January 18, 1986 (not yet docketed), page 91].

52. The Court has not been presented with any new evidence upon remand that would alter the findings in the Confirmation Order. The evidence upon remand does, however, make it clear that the debtors are taking inconsistent positions for purposes of these proceedings on the one hand and Dade County property tax proceedings on the other. The County appraised the facilities at \$183.7 million in 1984, while the debtors' "good faith estimate" of value for the Project was only \$87 million [see Exhibit "A" to C.P. No. 491, "Debtors' Emergency Motion for Authorization to Pay Good Faith Deposit on 1984 Dade County, Florida Real Estate Taxes", also marked as Exhibit "D" at the hearing of January 18, 1985].

53. Based upon all of the foregoing, the Court finds that the \$255.6 million purchase price offered by the Bank for the Project (including the FF&E) is fair and equitable, and is in the best interest of the creditors. The Court further finds that the Bank is a good faith purchaser.

Q. District Court Action

54. In the Confirmation Order, the Court noted the litigiousness of the parties:

If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must

be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The District Court Action is an illustration of that point. In the memorandum decision respecting the releases signed by each of the debtors [C.P. No. 20 in Adv.Pro. 85-0160], this Court held that the releases barred both future and existing claims relating to the transactions between the debtors and the Bank. Notwithstanding the releases and this Court's ruling on the releases, however, the debtors continued to maintain the District Court Action.

55. It is not surprising that the Bank required dismissal of the District Court Action as a condition to close the purchase under its Plan. It would make little sense for the Bank to invest new money, discharge its judgment lien, and release millions of dollars of cash collateral, only to remain exposed to continuing litigation costs (probably unrecoverable from the debtors). In light of the releases, no significant value can be assigned to the District Court Action; to the contrary, the continuance of the suit is a significant detriment because of the first-priority attorneys' fees that would have to be incurred to do so.

56. This analysis was confirmed upon remand by the expert testimony of a seasoned, local trial lawyer (and former Florida Circuit Court Judge), presented by the Bank upon remand [transcript of hearing of January 18, 1986 (not yet docketed), pages 34-39]. I find that the District Court Action has no significant value to the debtors.

R. Consummation of the Bank's Plan

57. The Court has now also had the unusual opportunity to observe the substantial consummation of the plan under evaluation (after the debtors failed to post the appeal bond upon which a stay was conditioned). The fairness, feasibility, and propriety of the plan have been verified by the following, as reported by the parties and the Liquidating Trustee:

(a) all Class 1 administrative claims have been paid or reserved for;

(b) the Project was sold on October 10, 1985, resulting in the satisfaction in full of the claim of the Class 2 creditor (the Bank) and the termination of interest (accruing at over \$2 million per month) and negative cash flow from operations;

(c) the Class 3 creditor has been paid in full;

(d) Undisputed claims in Classes 4 through 6 have been paid in full, and funds have been reserved for all disputed claims;

(e) several disputed claims have been compromised, saving the estates millions of dollars as against the amount claimed; and

(f) there remain sufficient funds for the satisfaction in full or in part of the claims of the Gould-affiliated claimants (although the exact amount cannot yet be determined because so many of the claims are unliquidated).

No stay is in effect, and the confirmed plan has been consummated. The debtors' property passed to the Liquidating Trustee, and the debtors were discharged under Code Section 1141. It is now legally and practically impossible to unwind the consummation of the Bank's plan or otherwise to restore the status quo before confirmation.

Conclusions of Law

S. Substantive Consolidation

58. Substantive consolidation, derived from this Court's general equitable powers under 11 U.S.C. §105, is a case-by-case inquiry. 5 *Collier on Bankruptcy*, ¶1100.6 at 1100-33 (15th ed.). In substantive consolidation cases, "the relationship between entities with respect to which consolidation is sought is far more important than the nature of such entities". *Id.* Thus it is not significant that the debtors

sought to be consolidated are an individual, two partnerships, and two corporations.

59. Certain objective criteria should be considered in evaluating whether substantive consolidation is warranted:

(a) The presence or absence of consolidated financial statements;

(b) The unity of interests and ownership between various corporate entities;

(c) The existence of parent and intercorporate guarantees on loans;

(d) The degree of difficulty in segregating and ascertaining individual assets and liabilities.

(e) The existence of transfers of assets without formal observance of corporate formalities;

(f) The commingling of assets and business function; and

(g) The profitability of consolidation at a single physical location.

In Re Donut Queen, Ltd., 41 B.R. 706, 709 (Bkcty., E.D.N.Y. 1984).

60. However, "there is no one set of elements which, if established, will mandate consolidation in every instance." *In re Snider Bros., Inc.*, 18 B.R. 230, 234 (Bkcty. D. Mass. 1982). Instead, "the enumerated factors should be evaluated within the larger context of balancing the prejudice resulting from the proposed order of consolidation with the prejudice the moving creditor alleges it suffers from debtor separateness". *In re Donut Queen, supra*, at 709-10.

61. The Court also may approve substantive consolidation when the expense and difficulty of determining intercompany claims, liabilities, and ownership of assets is substantial. *Chemical Bank New York Trust Co. v. Kheel*,

369 F.2d 845, 847 (2d. Cir. 1966); *In re Nite Lite Inns*, 17 B.R. 367, 371 (Bkcty. S.D. Cal. 1982).

62. On the facts established here (Paragraphs 29 through 41, above), substantive consolidation is appropriate. Because of controlling provisions of Florida law relating to creditor's rights, substantive consolidation under the Bank's plan here does little more than to adopt and implement state law. For example:

(a) In due course, a creditor of MCLP could reach (i) Gould's assets (because of his liability as a general partner), (ii) MCC's assets (because of MCC's role as a general partner), (iii) Holywell's assets (net of its liabilities), by levying upon Gould's ownership of 100% of the stock of Holywell, and (iv) Chopin's assets (net of its liabilities), since it is owned 36% by Gould and 64% by MCC. The pertinent provisions of Florida's partnership laws are:

(1) *620.62 Partnership bound by partner's wrongful act.* When loss or injury is caused to a person, not a partner in the partnership . . . the partnership is liable for it to the same extent as the partner so acting or omitting to act.

(2) *620.625 Partnership bound by partner's breach of trust.* The partnership is bound to make good the loss:

(i) When one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(ii) When the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by a partner while it is in the custody of the partnership.

(3) *620.63 Nature of partner's liability.* All partners are liable:

(i) Jointly and severally for everything chargeable to the partnership under §§620.62 and 620.625.

(b) The foregoing statutes, which extend to breaches of contract by Gould, also make MCLP and Chopin responsible for any liabilities of Gould incurred in connection with the Miami Center Project.

(c) Similarly, a creditor of Holywell ultimately could reach (i) MCC's assets (net of its liabilities), because MCC is 100% owned by Holywell, (ii) MCC's ownership, in turn, of 47.88% of MCLP and 64% of Chopin, (iii) Gould to the extent he acted as director or president of Holywell to misapply Holywell's funds (see Paragraph 37, above), and (iv) MCLP because of Holywell's alleged ownership of a claim for over \$4 million against MCLP (see Paragraph 35(a), above).

(d) Finally, creditors of MCC and Chopin eventually could reach those debtors' partnership interests in MCLP and therefore the net assets of MCLP itself (under Sections 620.62 and 620.625, Florida Statutes, *supra*), and a creditor of Chopin could reach the assets of both MCC and Gould (because each is a general partner of Chopin).

63. The Court found [C.P. No. 844, page 97], that the alternative to substantive consolidation, "would appear to be an unnecessarily circuitous, time-consuming, and expensive exercise that might conceivably lead to the diversion of some assets which, under the principles of law as I understand them, ought to be available for the satisfaction of these obligations". In short, if the creditors of the five separate estates seek to assert their claims against the primary obligors, the other estates which have contingent or secondary liability under Florida law for those claims may be closed (and any residue diverted or misapplied) before the primarily liable estate is exhausted. Substantive consolidation avoids the unfairness inherent in such a result.

64. Analyzing the seven factors enumerated in *In re Donut Queen, supra*, the Court concludes that:

(a) Consolidated financial statements were prepared as to Holywell, MCC, and MCC's interests in Chopin and MCLP (see Paragraphs 32 and 39, *supra*). In addition, even the debtors' bi-weekly debtor-in-possession reports were prepared on a consolidated basis during the period before confirmation [see, for example, C.P. No. 423].

(b) There is a single common element of interest, control, and ownership of all five debtors: Theodore B. Gould.

(c) The debtors' schedules reflect numerous cross-guaranties of loans and other obligations of the debtors. In particular, all five debtors guaranteed all of the Bank's advances to MCLP and to Chopin (totalling over \$240 million in principal and interest).

(d) The inter-company debts, in excess of \$31.8 million, would require substantial accounting and legal expenditures to investigate and adjust. The costs of such an investigation would delay payments to unaffiliated creditors and would reduce the amount available to pay creditors. In light of the joint and several liability of several of the debtors under Florida law, such expenditures are not warranted.

(e) Gould operated the debtors without regard to their separate identities. He caused Holywell, for example, to advance \$1.75 million to him without the formality of even a promissory note (see Paragraph 37, *supra*). He testified to numerous pre-petition transfers among the debtors and their affiliates [C.P. No. 385h, page 202].

(f) Business functions and assets were commingled. Certain debtors regularly paid obligations and performed services for other debtors and their affiliates, instead of letting the beneficiary pay or perform directly [C.P. No. 385h, pages 45, 55, 67-69, 141].

(g) The debtors can operate (and are operating successfully at a single location. Having announced an intention to leave Miami, the debtors' single office is now in Charlottesville, Virginia [C.P. No. 844, page 50].

65. Each of the seven factors supports substantive consolidation in this case. Moreover, there is no prejudice to the creditors. The creditors did not object to substantive consolidation, and the Creditors' Committees supported that aspect of the Bank's plan.

66. The debtors have claimed prejudice, but have not proven it. At the hearing on July 18, 1985 [C.P. No. 844, page 68], the debtors indicated no objection to consolidation except in the case of Holywell's consolidation with MCLP:

[The Court]: . . . if the—well, let me ask a preliminary question—the nub here, the serious problem and the only serious problem, I take it, that the debtor has with consolidation is the attempted consolidation of Holywell and MCLP?

[Debtors' Counsel]: That's correct, and Holywell is the one objecting.

The debtors never demonstrated prejudice as an unavoidable consequence of substantive consolidation. There has been no evidence to substantiate the debtors' claim that substantive consolidation will somehow cost them "approximately \$17 million in Federal income taxes" [C.P. No. 580, page 2].

67. Based upon all of these factors and the authorities cited, and in the exercise of its equitable powers under Code Section 105(a), the Court finds that substantive consolidation in the minimal form proposed by the Bank is equitable, is in the best interest of the creditors, and (because of the substantial unity of ownership interests in all five debtors in Gould) does not unfairly prejudice the debtors. As provided by the Bank's plan, each debtor will retain its individual name, form of organization, and the right to continue

business, after discharge. The debtors will not disappear in a merger-like consolidation as is sometimes sought in such cases. The Bank's plan does require that each debtors' assets be exposed to the claims of creditors of all of the related estates, however, so the Bank has labelled that aspect of its plan as "substantive consolidation." The Court finds that the Bank has accepted and satisfied its burden under applicable precedent. The Court does not believe that the hundreds of creditors involved here should be required to engage in a shell game or to have to guess which debtor is most likely to be able to pay. Many of the creditors are not represented by counsel and apparently are not even aware that they have claims against several of the estates under Florida law, rather than just the single estate of the primary obligor. The need for creditors to file such claims and to trace assets is completely attributable to the labyrinth that Gould has created. Consolidation here will not make any debtor pay any creditor unless that debtor or one of its secondarily-liable co-debtors (principally Gould) was legally responsible for the claim involved.

T. Classification

68. Section 1122(a) of the Code directs that, with a single exception not applicable here, "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class".

69. The creditors that have objected to a junior classification hold claims that are markedly dissimilar, both as to the ultimate effect of payment of the claim and as to the special property held by the claimant (see Paragraphs 42 through 45 above). In the case of MCJV:

(a) Payment of MCJV's claim will benefit debtor Gould's 50% equity interest in MCJV by 50% of the payment. MCJV's claim is in essence a hybrid of debt (to the extent

that O&Y, a non-debtor is benefitted) and equity (to the extent that a debtor, Gould, is benefitted.

(b) MCJV's claim can readily be satisfied from special property (the four downtown lots, appraised at \$104 million) held by MCJV and not directly available to satisfy the claims of creditors that are not affiliated with Gould. MCJV's claim can be satisfied by merely reducing Gould's equity interest in, and other claims against, MCJV. Under the equitable principle of marshalling, MCJV may be required to look first to a source of recovery unavailable to other competing creditors. *In re All American Holding Corp.*, 10 B.R. 71, 73 (Bkcty. S.D. Fla. 1981), *aff'd*, 17 B.R. 926, 928-29 (S.D. Fla. 1982); *Matter of Emerald Hills Country Club*, 32 B.R. 408, 421-22 (Bkcty. S.D. Fla. 1983).

70. In the case of HTC and HLC, both are wholly-owned subsidiaries of a debtor and are completely controlled by Gould. It would be inequitable to permit such claimants to share ratably with unaffiliated unsecured creditors. To do so here would be to violate the absolute priority rule by permitting a debtor and its equity interests to share equally and in parity with an unsecured creditor. In view of Gould's undisputed control of these claimants, they were properly classified below the general unsecured creditors.

71. In the case of O&Y, the marshalling analysis set forth above is also applicable. As the only other general partner of MCJV, O&Y has access to a special source of recovery (Gould's ownership interest in MCJV) that is unavailable to other creditors. Additionally, any payment to O&Y reduces O&Y's parallel claim against MCJV in the remanded arbitration proceedings now pending between O&Y and Gould, thereby increasing Gould's 50% equity interest. By reducing the aggregate liabilities of MCJV, any such payment benefits Gould by an amount equal to 50% of the payment. That is not the case with respect to payments made by the debtors to unaffiliated creditors. The Court also notes that the debtors' plans [C.P. No. 466-70] classified O&Y

separately, based upon the fact that O&Y has recourse to the MCJV property. The debtors' plans contemplated that O&Y would not be paid until (a) the arbitration and litigation between O&Y and Gould reached an end and (b) MCJV sold a substantial part of its real estate.

72. Each of these objecting affiliated creditors is an "insider" under 11 U.S.C. §101(28)(A) (subparagraph (ii), as to MCJV; subparagraph (iii), as to O&Y; and subparagraph (iv) as to HTC and HLC). On facts similar to those here it has been held that an insider may not, "share the same priority with general unsecured creditors of the Debtor". *In re Economy Cast Stone Co.*, 16 B.R. 647, 651 (Bkcty. E.D. Va. 1981); *In re Toy & Sports Warehouse*, 37 B.R. 141, 152 (Bkcty. S.D.N.Y. 1984).

73. The debtor's proposed plans also accorded a junior priority to the claims of "Affiliated Creditors", defined to include entities "in which the Debtor owns an equity interest", thereby assigning a junior classification to the claims of MCJV, HTC, and HLC [C.P. No. 466-470, Exhibit "A", pages 1-2].

74. The unaffiliated creditors would not likely have accepted a plan which gave higher or equal dignity to the claims of Gould-controlled entities. The claims of the Gould-controlled entities are not "substantially similar", either legally or in practical effect, to the claims of the unaffiliated creditors assigned separate and senior classes by the Bank's plan. Accordingly, the Bank's classification structure complies with 11 U.S.C. §1122(a).

U. *Equitable Subordination*

75. Based upon the Court's findings with respect to Gould's conduct (Paragraphs 46-48), the Court concludes that equitable subordination under Sections 510(c) of the Code and the tripartite test of *Mobile Steel Co.*, 563 F.2d 692, 700 (5th Cir. 1977), is warranted. The claims of MCJV, O&Y, HTC, and HLC warrant equitable subordination because Gould's

misconduct, and the attendant prejudice to other creditors, is imputed to those claimants as a matter of Florida partnership law and the law of agency. MCJV and O&Y themselves alleged such misconduct in their objections to the debtors' plans (Paragraph 9(a)(2), 9(a)(7), above). On the record here, Gould will not be permitted by this Court to receive distribution before, or even on a parity with, the unsecured creditors.

V. District Court Action

76. The Court has performed the "cost/benefit" analysis of the District Court Action, as suggested by the debtors. *Matter of Jackson Brewing Co.*, 624 F.2d 599 (5th Cir. 1980); *TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 20 L.Ed. 2d 1, 88 S. Ct. 1157 (1968).

77. The Court concludes (see Paragraphs 54-56) that the claims asserted in the District Court Action are barred (a) by the releases executed by the debtors and (b) by this Court's memorandum decision [C.P. No. 20 in Adv. Pro. 85-0160], which bars re-litigation of the release issue. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984). Based upon that conclusion and the testimony of the only expert witness to address the matter, the District Court Action is not worth the cost of prosecution.

78. The Bank's plan and the Liquidating Trustee may lawfully dismiss the District Court Action. The District Court Action is an asset of the debtors' estates subject to the jurisdiction of this Court. 11 U.S.C. §541(a)(1); *In re Auto West, Inc.*, 43 B.R. 761, 763 (D. Utah 1984). The Bank's plan provided that ownership of the District Court Action passed to the Liquidating Trustee, who thereby acquired the power to pursue, abandon, or compromise the claims. 11 U.S.C. §1141(c). This Court has not in any way encroached upon the jurisdiction of the District Court. Ownership of the District Court Action passed to the Liquidating Trustee when the debtors failed to stay consummation, and the Liquidating

Trustee has stipulated to dismissal of the lawsuit. In doing so, the Liquidating Trustee was performing a condition precedent to the realization of significant benefits for the estates—the closing of the sale of the Project, the resultant infusion of millions of dollars of new cash, and the release of over \$30 million of the Bank's cash collateral.

W. Confirmation Requirements

79. The parties' certificates on the voting [C.P. No. 658-64] were verified by the Clerk's office.

80. The debtors' plans failed to receive acceptance under 11 U.S.C. §1126(c). I also conclude that the debtors' plans were not feasible because of the delays and contingencies inherent in both the Hadid contract and the attempt to subordinate the Bank's \$240 million claim. Finally, the debtors' plans cannot be confirmed because of the Court's finding (Paragraph 28) that consummation likely would have been followed by liquidation or the need for further financial reorganization. 11 U.S.C. §1129(a)(11).

81. The stipulations [C.P. No. 564, 614, 709c, and 876a] and second amendment [C.P. No. 854] did not adversely affect any party other than the Bank, and therefore did not require a supplemental disclosure statement or hearing for purposes of Code Section 1127. The Bank's plan as so amended was accepted by the requisite number of creditors in Classes 1 through 6. (Paragraph 15; 11 U.S.C. §1126(c)). The Gould-affiliated Classes (7 through 9) rejected the Bank's plan.

82. The Bank's plan does not discriminate unfairly, and is fair and equitable with respect to each of the three classes that did not accept it. The Bank's plan complies with Sections 1129(a) and (b) of the Code:

(a) The Bank's plan complies with the applicable provisions of Chapter 11 of the Code.

(b) The Bank, as proponent of its plan, has also complied with applicable provisions of Chapter 11.

(c) The Bank's plan has been proposed by the Bank in good faith, and not by any means forbidden by law.

(d) Any payments made or promised by the Bank for services or for costs and expenses in, or in connection with the case, or in connection with the plan and incident to the case, have been disclosed to the Court; there are no such payments to be made before confirmation; and each such payment to be fixed after confirmation is subject to the approval of this Court as reasonable.

(e) The Bank has disclosed the identity and affiliations of the Liquidating Trustee, and the Trustee's appointment and continuance in office are consistent with the interests of the creditors and equity interest holders, and with public policy. Section 1142 of the Code specifically contemplates the possibility that a liquidating trust and trustee may be the entities designated by a plan to carry out the plan after confirmation. Further, the Bank has disclosed the identity of any insider that will be employed by or retained by the reorganized debtors, and the nature of any compensation for such insider.

(f) There are no regulatory commissions with jurisdiction (for purposes of Section 1129(a)(6)).

(g) With respect to each impaired class of claims or interests, (1) each holder of a claim or interest of such class has (A) accepted the Bank's plan or (B) will receive or retain under the plan on account of such claim or interest property of a value, as of the "Effective Date", that is not less than the amount such holder would receive or retain in liquidation, or (2) if Code Section 1111(b)(2) applies to the claims of such class, each such holder will receive or retain on account of such claim property of a value, as of the Effective Date, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims. Under the Bank's plan, all mechanics' lienors are paid in full

so the debtors' objections regarding the priority of such liens are moot.

(h) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Bank's plan provides that: (1) with respect to a claim of a kind specified in Sections 507(a)(1) or 507(a)(2) of the Code, on the Effective Date, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim; (2) with respect to a class of claims of a kind specified in Sections 507(a)(3), 507(a)(4), or 507(a)(5) of the Code, each holder of a claim of such class will receive, if such class has accepted the Bank's plan, deferred cash payments of a value, as of the Effective Date, equal to the allowed amount of such claim (or, if such class has not accepted the plan, cash on the Effective Date equal to the allowed amount of such claim); and (3) with respect to a claim of a kind specified in Section 507(a)(6) of the Code, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding 6 years after the date of assessment of such claim, of a value, as of the Effective Date, equal to the allowed amount of such claim.

(i) At least one class of claims has accepted the Bank's plan, determined without including any acceptance of the plan by an insider holding a claim of such class.

(j) Confirmation of the Bank's plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtors or any successors to the debtors under the Bank's plan, except to the extent that liquidation or reorganization is proposed by the plan.

(k) With respect to the impaired classes and creditors that rejected the Bank's plan (MCJV, O&Y, the debtors, and the debtors' affiliates) and the requirement of Code Sections 1129(a)(8) and 1129(b), the Bank's plan does not discriminate unfairly and is fair and equitable with respect to each such impaired class of claims:

(1) Each holder of an impaired secured claim has retained the lien securing such claim, to the extent of the allowed amount of such claim, and will receive on account of the claim deferred cash payments totalling at least the allowed amount of the claim and of a value, as of the Effective Date, of at least the value of such holder's interest in the debtors' interest in such property.

(2) (A) Each holder of an impaired unsecured claim has received or retained on account of such claim property of a value, as of the Effective Date, equal to the allowed amount of such claim, or (B) the holder of any claim or interest junior to the claims of such impaired, unsecured class will not receive or retain any property on account of that junior claim or interest.

(3) (A) Each holder of an interest will receive or retain on account of such interest property of a value, as of the Effective Date, equal to the value of such interest (no such holder is entitled to a fixed liquidation preference or fixed redemption price, so far as the record reflects), or (B) the holder of any interest junior to the interests of such class will not receive or retain any property on account of that junior interest. The priority of distribution to Holywell creditors pursuant to stipulation does not adversely affect any equally-situated creditors, since all creditors through Class 6 will be paid in full. Accordingly, the Bank's plan was and is entitled to confirmation.

In accordance with the Order of Remand, the foregoing findings of fact and conclusions of law are hereby incorporated within, and made a part of, the Confirmation Order, *nunc pro tunc*.

DONE AND ORDERED at Miami, Florida, this ____ day
of January, 1986.

Thomas C. Britton
Bankruptcy Judge

cc: Counsel and Parties
per attached Service List

APPENDIX P

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

In re HOLYWELL CORPORATION

CASE NO. 84-01590-BKC-TCB

Debtor (set forth here all names including trade names used by Debtor within the last 6 years)

Social Security No.

and Debtor's Employer's Tax Identification No. 52-1070235

Schedule A - STATEMENT OF
ALL LIABILITIES OF DEBTOR

Schedules A-1, A-2, and A-3 must include all the claims against the debtor or his property as of the date of the filing of the petition by or against him

SCHEDULE A-1 - CREDITORS HAVING PRIORITY

Amount of Claim	Amount of Priority	Amount of Claim	Amount of Priority	Amount of Claim	Amount of Priority
10 Wages, salary, and other compensation including vacation, sick leave, and death benefits owed by or for the debtor or debtor's employer for services rendered within 180 days before filing of petition or liquidation of business (if debtor is partnership)	(SEE ATTACHED SCHEDULE)	Employment 8/1 - 8/22/84 (16 work days) *Pursuant to Bankruptcy Court Order dated 8/24/84	Paid 9/1/84	31.00	
11 Contributions to employee benefit plans for deferred compensation within 180 days before filing of petition or liquidation of business (if debtor is partnership)	None				
12 Taxes by individual, and including taxes for cash for property, sales, or income of property or services for personal use of individual and that are not deferred or withheld	None				
13 Taxes owing (including for cash to and being collected by: (1) To the United States (2) To any state (3) To any other taxing authority)	1) Internal Revenue Service Appeals Office 432 Universal N. Bldg 1875 Connecticut Avenue Washington, DC 20009 Internal Revenue Service Memphis Service Center 3131 Democrat Road Memphis, TN 38110 2) D.C. Treasurer Accounts Receivable Sec. 300 Indiana Ave., N.W. Washington, DC 20001 Same as Above 3) Tax Collector PO Box 520410 Miami, FL 33152	7/31/80 - Corporate Income Tax 7/31/81, 7/31/82, 7/31/83, 7/31/84 Corporate Income Tax Adj's 8/03/84 - Federal Withholding and Fica Deposit - 3rd Qtr. 10/15/83 - Franchise Tax 7/31/84 - Franchise Tax 1/1/83 - 1983 Personal Property Tax	Disputed Contingent & Unliquidated Unliquidated Contingent & Unliquidated	489,063.00 Unknown 13,028.41 4,650.00 Unknown 3,453.97	
Total \$ 542,137.48					

SCHEDULE B-2

t) Stocks and interests in incorporated and unincorporated companies:

	<u>Ownership</u> <u>%</u>	<u>Market Value</u>
Parkwell, Inc.	100 %	\$ 750,000
Twin Development Corporation	100	13,210,000
Charleston Center Corporation	100	- 0 -
Whitehall Security Corporation - W	100	572,000
Holywell Leasing Company	100	100,000
PBA, Inc.	100	100
Miami Center Corporation	100	20,630,000
Holywell Management of Wash., Inc.	100	1,913,000
Holywell Construction Company	100	100
Orion Mechanical Services, Inc.	100	343,000
Studley - Holywell Associates, Inc.	50	100
NHA Corporation	66.6	17,000
Whitehall Building Services, Inc.	100	95,000
Parkwell of Florida, Inc.	100	100,000
Orion Engineering of Florida, Inc.	100	37,000
Holywell Telecommunications, Inc.	100	1,000,000
Holywell Hotels, Inc.	100	100
Holywell Management of Florida, Inc.	100	160,000
Holywell Insurance Services, Inc.	100	100
Whitehall Security Corporation - FL	100	360,000
Orion Cleaning Services of Wash., Inc.	100	719,000
		<u>\$40,006,500</u>